Petition

81-1818

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1981

BURKE E. CASARI, individually and as Director of the Section of Hospital and Medical Facilities of the Nebraska Department of Health, and HENRY D. SMITH, individually and as Director of the Nebraska Department of Health,

Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, a corporation,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a federal court have jurisdiction under 28 U. S. C. § 1331 when the petition alleges violation of rights under federal statutes and the federal Constitution but the case can be decided on an interpretation of state law?

2. Does a federal court have jurisdiction over a suit against state officials named in their official capacities or against them named in their individual capacities when the relief prayed for would require them to act in their official capacities to give retroactive relief?

3. Does 42 U. S. C. § 1320a-1(f) preclude review by a federal court of the decision of the state designated planning agency (DPA) in the § 1122 review process of the Social Security Act?

4. Was First Federal denied due process of law because a state which had a contract with the federal government to make § 1122 reviews did not have state rules governing such reviews in effect at the time First Federal voluntarily submitted its application for such a review but did have such rules in effect at the time it made its decision regarding that application, at the time First Federal appealed that decision for administrative review and at the time First Federal began operation of its facility as one that was subject to such review by the state?

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OPINIONS DELIVERED BY THE COURTS BELOW

1. United States Court of Appeals for the Eighth Circuit

a. Order and opinion of a three-judge panel in *First Federal Savings and Loan Association of Lincoln, a corporation v. Burke E. Casari, et al.*, 667 F. 2d 734 (8th Cir. 1982), affirming in part and reversing in part the order of the United States District Court for the District of Nebraska (Roy L. Stephenson, Circuit Judge). The court affirmed the finding of the district court that the petition-

ers are without authority under state law to submit a finding to the Secretary of Health and Human Services that respondent's proposal for reopening a health care facility was not in conformity with § 1122 of the Social Security Act. It reversed the order that petitioners submit to the secretary a finding that respondent's project is in conformity with § 1122. It affirmed the order that petitioners advise the secretary that their notice of nonconformity dated May 24, 1979, should be considered withdrawn and void. *See*, Exhibit A.

b. Order filed February 4, 1982, staying the mandate of the court for sixty days from that date. *See*, Exhibit B.

2. United States District Court for the District of Nebraska (Warren K. Urbom, C. J.).

a. Order filed February 9, 1981. *See*, Exhibit C.

b. Memorandum of Decision filed February 9, 1981. *See*, Exhibit D.

c. Order filed March 24, 1981, staying the judgment of the court pending appeal and until such appeal is terminated. *See*, Exhibit E.

GROUNDS FOR JURISDICTION

This Court has authority under 28 U. S. C. § 1254(1) to review this case by writ of certiorari granted upon the petition of any party after judgment by the circuit court on January 6, 1982. Under 28 U. S. C. § 2101(*c*) and Rule 20.2 of this Court, an application for a writ of certiorari is timely if made within 90 days after the entry of such judgment. Under Rule 20.4 that time runs from the date

the judgment sought to be reviewed is entered. Thus a petition for certiorari filed on or before April 6, 1982, will be timely in this case. This application is made prior to that time and the Court has jurisdiction to review the judgment of the circuit court.

There are four special and important reasons why this Court should grant a writ of certiorari in this case:

1. The United States Court of Appeals for the Eighth Circuit decided a federal question contrary to the Eleventh Amendment as interpreted by this Court in a line of cases through *Quern v. Jordan*, 440 U. S. 332 (1979) by affirming an order of the district court directing state officials to take affirmative governmental action to give First Federal retroactive relief.

2. The United States Court of Appeals for the Eighth Circuit in this case decided a federal question in conflict with applicable decisions of this Court by finding that there was subject matter jurisdiction under 28 U. S. C. § 1331 in a case that had to be decided with reference to state laws.

3. The United States Court of Appeals for the Eighth Circuit in this case decided a federal question in conflict with applicable decisions of this Court by holding that First Federal was denied due process of law under the facts of this case.

4. The United States Court of Appeals for the Eighth Circuit has rendered a decision in this case in conflict with the United States Court of Appeals for the Third Circuit in *Wilmington*

United Neighborhoods v. United States Department of Health, Education & Welfare, 615 F. 2d 112 (3d Cir. 1980), *cert. denied*, 449 U. S. 827 (1980), in that it has held that a decision of the designated planning agency can be reviewed by a federal court notwithstanding § 1122 (f) of the Social Security Act.

THE CONSTITUITIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS THE CASE INVOLVES

1. *The Eleventh Amendment of the United States Constitution*

   The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. *The Fifth Amendment of the United States Constitution*

   No person shall . . . be deprived of life, liberty, or property without due process of law.

3. *The Fourteenth Amendment of the United States Constitution*

   [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

4. 28 U. S. C. § 1331 (a)

   The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution,

laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

5. Neb. Rev. Stat. § 84-905.01 (Reissue 1976)

A copy of each amendment or rule to be adopted under this act, prior to the date of filing with the Secretary of State and the Revisor of Regulations, shall be submitted to the Attorney General for his consideration as to the statutory authority and constitutionality of such amendment or rule, and his approval or disapproval thereof. If the amendment or rule to be filed is approved as to legality by the Attorney General, he shall so indicate with his stamp of approval which shall be dated and signed.

6. Neb. Rev. Stat. § 84-906 (Reissue 1976)

No rule of any agency shall be valid as against any person until five days after such rule has been filed with the Revisor of Regulations. No rule required under this act to be filed with the Secretary of State and Revisor of Regulations shall remain valid as against any person until the certified copy of the rule shall have been so filed on the date designated and in the form prescribed by the Revisor of Regulations. The filing of any rule as herein provided shall give rise to a rebuttable presumption that it was duly and legally adopted.

7. Neb. Rev. Stat. § 84-908 (Reissue 1976)

No adoption, amendment, or repeal of any rule shall become effective until the same shall have been approved by the Governor and filed with the Revisor of Regulations.

8. 42 U. S. C. § 1320a-1 (excerpts)

Exhibit F in Appendix.

9. 42 C. F. R. Part 100 (excerpts)

Exhibit G in Appendix.

10. Rule 34 of the Department of Health of the State of Nebraska (excerpts)

Exhibit H in Appendix.

STATEMENT OF THE CASE

The State of Nebraska (Department of Health) contracted with the federal government (Secretary of Health, Education and Welfare now Health and Human Services) to conduct "§ 1122" reviews, that is, to make recommendations to the Secretary of Health and Human Services about whether each proposed capital expenditure by a health care facility in this state was "needed" as determined by applicable criteria. The reviews are to be conducted by the Section of Hospital and Medical Facilities of the Department of Health, the designated planning agency (DPA). The DPA's decision can be appealed to the designated appeal board, the Board of Health.

If the state recommends approval of a proposed project for reimbursements, the health care facility proposing the project is entitled to reimbursements for capital costs under Medicare and Medicaid and Maternal and Child Health programs. If the state does not recommend approval, such reimbursements are possible only if the Secretary makes certain findings.

Both the contract between the State of Nebraska and the federal government and the federal regulations for implementing § 1122 review require the state to have rules setting up procedures for applying for such a review, criteria for judging such applications, and procedures for an administrative review of the decision. These rules must be consistent with the federal regulations.

In this case the federal regulations were in effect at the time First Federal applied for review of its proposed project but the state did not have its state rules governing such reviews in effect at the time First Federal voluntarily submitted an application for review. During the state's review of that application, which review was timely under the federal regulations, the state did put into effect the required state rules. The criteria for judging the application were in effect as a state rule at the time the state recommended that the project not receive the federal reimbursements because it found the project did not meet applicable criteria.

The procedures for an administrative review of that decision were in effect as a state rule at the time First Federal appealed that decision. Following a hearing, the decision was affirmed by the appeal board and the state recommendation against reimbursements for the project was sent to the Secretary of Health and Human Services who then denied the reimbursements.

First Federal appealed the state decision to the state court and brought this action in the federal district court. Its amended petition sought to compel petitioners to withdraw their recommendation against reimbursements for First Federal's proposed project. (The petitioners are two state officials who acted as agents of the state in making the review of First Federal's application and in sending the recommendation against reimbursements to the Secretary of Health and Human Services. They are sued as individuals and in their official capacities, one as Director of the Section of Hospital and Medical Facilities of the Department of Health and one as Director of the Department of Health of the State of Nebraska.)

The federal district court found that the state had no authority to conduct the review and ordered the petitioners to withdraw their prior finding sent to the Secretary of Health and Human Services, to find that First Federal's proposed project *did* meet applicable criteria and submit such finding to the Secretary of Health and Human Services and advise that Secretary that the notice of nonconformity previously submitted should be withdrawn and void.

The petitioners appealed that decision to the Circuit Court of Appeals for the Eighth Circuit. It affirmed the order of the district court except it reversed the portion requiring petitioners to find that First Federal's application met applicable criteria and advise the Secretary of Health and Human Services of that fact. It stayed its mandate until April 5, 1982, so the petitioners could apply for certiorari.

ARGUMENT

I.

The United States Court of Appeals for the Eighth Circuit has decided a federal question in a way that is in conflict with applicable decisions of this court by holding it had jurisdiction over state officers to compel them to take affirmative action to give retroactive relief.

This is an action to compel state officials to do affirmative acts in order to correct injuries occurring in the

past, allegedly because those state officials acted without authority.

The lower courts assumed jurisdiction of this case although, according to applicable decisions of this Court, such an action is barred by the Eleventh Amendment.

In *Chisholm v. Georgia*, 2 U. S. 2 (1793), the State of Georgia was sued by an individual. The Court held that such a suit could be maintained. This "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the Legislatures of the States." *Hans v. State of Louisiana*, 134 U. S. 1, 11 (1890).

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

As the Court said in *Hans*, above, that amendment "actually reversed the decision of the supreme court." Accordingly, this Court held that the Eleventh Amendment also bars a suit directly against a state by its own citizens unless the state consents to such suit even though the amendment does not expressly say so.

> The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by *Mr. Justice* Iredell in his opinion in *Chis-*

> *holm v. Georgia;* and it has been conceded in every case since, where the question has, in any way been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. . . . [Citations omitted.] In all these cases the effort was to show, and the court held, that *the suits were* not against the State or the United States, but *against the individuals*; conceding that if they had been against either the State or the United States, they could not be maintained.

(Emphasis added.) *Supra* at 16.

For example, Mr. Chief Justice Marshall made clear in *Osborn v. Bank of United States,* 9 Wheat 738 (1824), that in determining whether a court can grant relief the key inquiry is whether the state officer was in fact the real party in interest or whether he was only a nominal party.

In *Governor of Georgia v. Madrazo,* 1 Pet. 110 (1828), demand for relief from the state treasury had been made against the governor of the state. Mr. Chief Justice Marshall declared:

> In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made.

Supra at 123, 124.

Poindexter v. Greenhow, 114 U. S. 270 (1884), was a suit by a taxpayer against the state treasurer and tax collector who had allegedly wrongfully refused the plaintiff's tender of coupons to pay taxes due and then levied against Poindexter's desk to cover such taxes.

One defense was that the defendant was guilty of no personal wrong but had acted only in his official capacity, representing the state, so the suit was against the state and barred by the Eleventh Amendment.

The Court said, "It is also true that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record." The state is not actually a party where an individual is sued for an injurious act committed while claiming to act as a state officer if the state officer didn't have authority to do the act.

> That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.

Supra at 290. Thus, to make out a defense that a suit is barred by the Eleventh Amendment, an individual sued for acts he claims were done on behalf of the state "must show that his authority was sufficient in law to protect him." *Id.* at 287.

The defendant was unable to do so in that case because the Court found that the state law on which he was relying was unconstitutional because it interfered with contractual rights.

Ex parte Young, 209 U. S. 123 (1908), was in accord. In that case the Attorney General of the State of Minnesota was ordered to conform his future conduct to the Fourth Amendment by *not* enforcing a state law which did not conform to the provisions of that amendment.

> There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only

> direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. Board of Liquidation v. McComb, 92 U. S. 531-541, 23 L. ed. 623-628.
>
> The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer *from* taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case *no affirmative action of any nature is directed,* and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction *to prevent him from doing* that which he has no legal right to do is not an interference with the discretion of an officer.

(Emphasis added.) *Supra* at 158, 159.

The Court in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1948), was true to precedent. It agreed that an order for the Assets Administrator not to sell or deliver coal to anyone but the plaintiff was relief against the sovereign and dismissed the action praying for such relief.

It discussed two types of cases which can be maintained against officers of the sovereign, *i. e.*, those where the officer has acted beyond the limits of his statutory authority and those where the state or order conferring power on the officer to take the action in the sovereign's name is claimed to be unconstitutional. "These two types have frequently been recognized by this Court as the only ones in which a restraint may be obtained against the conduct of Government officials." *Supra* at 690.

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Id. at 691, n. 11.

Dugan v. Rank, 372 U. S. 609, 620 (1963), is in accord with both *Ex parte Young* and *Larson,* n. 11: "[A] suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain or interfere with the public administration,' . . . or if the effect of the judgment would be 'to restrain the government from acting or compel it to act.'"

Goldberg v. Kelly, 397 U. S. 254 (1970), like *Ex parte Young,* above, fell into the class where officers of the sovereign were enjoined from unconstitutional acts. (New York City welfare officials were enjoined from following New York state procedures authorizing termination without prior hearing of benefits paid to welfare recipients.)

Judge Friendly in *Knight v. State of New York,* 443 F. 2d 415, 420 (2d Cir. 1971), noted that despite assaults on the position of the Supreme Court in *Larson,* n. 11, by Professors Jaffe and Davis, "[t]he Court has not shown itself disposed to narrow *Larson.*" He left the task of overruling footnote 11 to the Supreme Court. *Supra* at 421.

In *Edelman v. Jordan,* 415 U. S. 714 (1974), state officials had wrongfully withheld AABD benefits by the untimely processing of applications. This Court reversed

the order for state officials to release and remit benefits wrongfully withheld. It left intact the order for the state officials to comply with federal time limits. This is consistent with *Ex parte Young* and *Larson*, n. 11.

When *Edelman* came before the Court again after remand as *Quern v. Jordan*, 440 U. S. 332 (1979), the Court held that a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their *future* conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. It upheld an order for state officials to give notice to members of the class suing them that the federal suit was at an end, that the federal court could provide them with no further relief, and that there were existing state administrative procedures which they might pursue.

In the present case the Eleventh Amendment as interpreted in *Poindexter* prohibits suit against petitioners in their official capacities. In those capacities they are the agents of the state and cannot do acts which are unauthorized or unconstitutional.

Poindexter would allow suit against them as individuals in such a case. So would *Ex parte Young* and *Larson* if the relief prayed for does not compel them to act affirmatively in their official capacities but compels them *not* to act in order to avoid *future* unauthorized or unconstitutional acts. *Edelman* did not change the law that petitioners cannot be ordered to correct injury caused by past unauthorized or unconstitutional acts. (The notice to injured parties upheld in *Quern* did not give the injured parties any relief but simply notified them that they would get no relief.)

In conclusion, any direction by the Court for petitioners to exercise governmental functions in order to correct alleged wrongs occurring in the past is a remedy against the state. The state is thus the real party in interest and this suit is barred by the Eleventh Amendment.

II.

The United States Court of Appeals for the Eighth Circuit in this case has decided a federal question in conflict with applicable decisions of this court by holding that it had subject matter jurisdiction under 28 U. S. C. § 1331 when the case had to be decided with reference to state laws.

In deciding that the court had subject matter jurisdiction under 28 U. S. C. § 1331 the circuit court found it unnecessary in this case to determine whether the complaint presented a federal question. Instead it found that although the district court was required to look to state law to ascertain whether the petitioners were within their power to act, resolution of that issue did not preclude further inquiry about allegations of due process and equal protection.

For this the circuit court relied on *Bell v. Hood,* 327 U. S. 678 (1946). That case let the petitioners decide whether to bring their action against FBI agents as one in trespass under state law or one of unlawful search and seizure under the Fourth Amendment. *Supra* at 681. But it did not negate *Gully v. First Nat'l. Bank,* 299 U. S. 109 (1936), where, as here, the state question must be answered first.

Among the well-established tests Justice Cardozo cited in that case for determining whether a federal court has jurisdiction of a suit as one arising under the Constitution and laws of the United States were that "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action" and it "must be such that it will be supported if the Constitution or laws *of the United States* are given one construction or effect, and defeated if they receive another." (Emphasis added.) *Supra* at 11.

> By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. Louisville & N.R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 S. Ct. 42, supra. With no greater reason can it be said to arise thereunder because permitted thereby.

Supra at 116.

> Petitioner will have to prove that the state law has been obeyed before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal rule. . . . The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

Supra at 117.

Justice Cordozo closed with the rationale for such a selective process:

> If we follow the ascent far enough, countless claims of right can be discover d to have their source or

> their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible.

We shall be lost in a maze if we put that compass by. *Supra* at 118. The Court then reversed and remanded the case to the state court.

In the present case the thrust in both the district court and circuit court was that the petitioners were without authority to act because there were no state rules for conducting § 1122 reviews in effect at the time the respondent applied for such a review. Then in one sentence the circuit court dealt with the allegation that respondent was thus denied due process. Relying on *Wolff v. McDonnell,* 418 U. S. 539 (1974), the circuit court concluded that because the petitioners acted without authority there was "a clear denial of due process."

This is not a case like *Bell v. Hood* where the petitioners had the alternative of having their complaint decided as a violation of state law *or* a violation of the Constitution. Instead it is a case like *Gully v. First Nat'l. Bank* where the question of whether state law has been violated must be decided and the question of constitutional law is one lurking farther in the background. Such a suit is not one "arising under the Constitution and laws of the United States." Thus the court did not have jurisdiction under 28 U. S. C. § 1331.

III.

The United States Court of Appeals for the Eighth Circuit in this case decided a federal ques-

tion in conflict with applicable decisions of this court by holding that first federal was denied due process of law under the facts of this case.

The Fifth Amendment of the United States Constitution provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment of the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The property interests protected by these constitutional provisions are normally not created by that Constitution but by an independent source such as state statutes or rules entitling the citizens to certain benefits. *Goss v. Lopez*, 419 U. S. 573 (1975).

Respondent claims it has a property interest in reimbursements for its investment in the nursing home, including the value at which First Federal acquired ownership in 1977 and the repairs made to ready it for reopening after it had been closed for twenty months. It reopened the facility as a nursing home *after* the state rules were in effect, *after* the state recommended against such reimbursements because the project didn't meet applicable criteria in effect as state rules and *after* respondent had appealed that recommendation for administrative review, conducted pursuant to state rules in effect at the time of the recommendation against reimbursement which was appealed.

In *Lakeside Mercy Hospital v. Indiana State Board of Health*, 421 F. Supp. 193 (N. D. Ind. 1976), *aff'd* without opinion, 547 F. 2d 1170 (7th Cir. 1976), the court summarized the purpose and fran ework for § 1122 reviews:

Until the enactment of 42 U.S.C.A. § 1320a-1, the repayment provisions of Medicare/Medicaid and other direct payment provisions supported by federal funds did not take into consideration whether the participating hospitals' facilities had been constructed in accordance with the various state plans relevant to Hill-Burton and other programs. Since Medicare/Medicaid would pay a hospital's "reasonable costs," and since depreciation, debt service, and other capital-related costs could reasonably be apportioned to the fee structure, *a hospital could circumvent the Hill-Burton requirements and still recover from the federal government a substantial part of its initial capital expenditure.* Thus the federal government would be subsidizing the construction of hospitals which, under Hill-Burton, had been determined to be unnecessary for appropriate delivery of health services in the area and thus were to be discouraged.

In 1972, Congress enacted section 1320a-1 (Social Security Act § 1122) to remedy this situation. Under this section, the Secretary is empowered to enter into agreements with the Governors of the various states, whereby a state agency will be appointed as a designated planning agency for 1320a-1 approval. The state agency is to develop a state plan for determining the necessity and evaluation of proposed capital expenditures, with the approval of the Secretary, and thereafter to screen and make recommendations on individual proposals for capital expenditures submitted by proposed or existing hospitals within the state. *The procedures by which the state agency is to pass upon individual applications are,* under the agreement between the Governor and the Secretary, *to be made in conformity with the regulations promulgated by the Secretary and in conformity with the Act (42 U.S.C.A. § 1320a-1).* Unless the Secretary determines otherwise, or unless the state agency rejects the proposed expenditure, the Secretary is to approve the capital expenditure for purposes of reimbursing by way of Medicare/

> Medicaid payments, the portion of the fees allocable to return of depreciation, debt service, and other capital-related expenditures. *If the state agency disapproves the expenditure, an appeal to the Secretary will lie; the Secretary's final determination is not reviewable in court.* 42 U. S. C. A. § 1320a-1.

(Emphasis added.) *Supra* at 196, 197. That court thus aptly summarized both the basis for respondent's property claim and the process due before that claim can be cut off.

Since the procedures followed by the state in this case were in conformity with § 1122 and with the federal regulations promulgated to enforce it, First Federal was on notice as to what would be required in § 1122 reviews conducted by the state pursuant to contract with the federal government. Failure of First Federal to comply with the application procedures set out therein *was not* the basis for the recommendation by the state that First Federal not receive the federal reimbursements. Thus First Federal was not thereby denied due process.

The basis for recommendation against reimbursement *was* the failure of First Federal's application to meet applicable criteria which were set out in a state rule in effect at the time of the state's decision. That decision was therefore not arbitrary and First Federal was not denied due process because its application was measured by those criteria.

The procedures for applying for an administrative review of that decision and for conducting that review were set out in a state rule in effect at the time that decision was made and no allegation is made that those procedures were not followed. First Federal was not thereby denied due process.

First Federal thus suffered no prejudice because the state did not have rules governing § 1122 reviews in effect at the time First Federal voluntarily applied for such review. The harm that it suffered was the consequence of the failure of its proposed project to meet applicable criteria which were in effect at the time it was determined that First Federal's project did not meet them.

After determining, because there were no state rules in effect at the time First Federal submitted its application for a § 1122 review by the state, that the state was without authority to review that application the courts below ignored all the procedures by which First Federal was given the process due it. This is evident from the one sentence in which the circuit court dealt with the alleged denial of due process:

> The defendants' subsequent conduct in nevertheless reviewing the proposal was entirely without authority, arbitrary and patently prejudicial to First Federal, therefore representing a clear denial of due process of law. *See, e.g., Wolff v. McDonnell,* 418 U. S. 539, 558 (1974).

The reference in *Wolff* was to "protection of the individual against arbitrary action of government" as the touchstone of due process. As discussed above, the action of the state in this case was not arbitrary where the criteria by which First Federal's application was judged were in effect as a state rule at the time they were applied. The standards for determining whether the application was timely were not on file at the time First Federal's application was submitted. However, they were not applied in this case. This *non-action* by the state can hardly be characterized as "arbitrary" or as "prejudicial" to First Federal.

As also noted in *Wolff* "the Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." First Federal received an administrative hearing on its appeal from the recommendation against reimbursement for its proposed project. The recommendation was affirmed by the appeal board so First Federal didn't get what it wanted. However, that is not the test for whether it got due process. Compliance with the procedures set up for that hearing is and no complaint is made that those procedures were not followed.

The circuit court's decision has not applied the tests for due process. That is, the decision of the circuit court is not based on a determination of whether First Federal was given the procedures to which it was entitled before its hope for reimbursements for capital expenditures was cut off. It characterizes non-action as arbitrary action. It is inconsistent with decisions of this Court interpreting due process and should be reversed.

IV.

The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the Court of Appeals for the Third Circuit.

42 U. S. C. § 1320a-1(f) provides:

> Any person dissatisfied with a determination by the Secretary under this section may within six months following notification of such determination request the Secretary to reconsider such determination. *A determination by the Secretary under this section shall not be subject to administrative or judicial review.*

(Emphasis added.)

In *Wilmington United Neighborhoods v. United States Department of Health, Education, et al.*, 615 F. 2d 112 (3d Cir. 1980), *cert. denied*, 449 U. S. 827 (1980), the court held that § 1122 (f) precluded judicial review not only of the decision of the Secretary of HEW but also of the State Designated Planning Agency:

> The district court held that while "section 1122 (f) does not expressly preclude judicial review of DPA approvals, . . . nonreviewability may be inferred from a statute's purpose and its legislative history." 458 F. Supp. at 641. We agree. Congress intended with Section 1122 to contain "hospital costs by limiting federal reimbursements covering capital expenditures for health care to those expenditures *deemed necessary by the state*" and to encourage "rational health planning *by the states.*" *NAACP v. Medical Center, Inc.*, 584 F. 2d at 627-628 (emphasis supplied.). The legislative history demonstrates that Congress envisioned that "[t]he bill would in no way change the autonomy or authority of existing State or local planning agencies." H. R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Admin. News, pp. 4989, 5066. The surest way to "change the autonomy or authority of existing State or local planning agencies" is to hold that the DPA's determinations are reviewable. We decline to do so.
>
> The district court correctly reasoned:
>
> > Given the prohibition on judicial review of the Secretary's decision set forth in Section 1122 (f), it is inconceivable that Congress could have intended the Federal Judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of a proposed capital expenditure.
>
> 458 F. Supp. at 641.

Supra at 119, 120.

> Statutes precluding judicial review would be rendered meaningless if the federal courts could always intervene in so-called "federal" programs.

Id. at 120.

> To allow the review of the DPA decisions as urged by dissent disregards the fact that the DPA is a single step in an administrative decision-making process where Congress was clearly concerned about making the Section 1122 review process a streamlined procedure. *See* 42 C. F. R. § 100.106 (a) (2).

Id. at 120.

> For these reasons, we remain convinced that the DPA's approval of a capital expenditure is unreviewable under Section 1122.

Id. at 121.

The same policy consideration of expediency is present when the DPA *dis*approves a capital expenditure as when it approves a capital expenditure. Section 1122 (f) makes no distinction between instances when the Secretary approves or disapproves a capital expenditure. There will be persons dissatisfied with a decision to approve reimbursements as well as with a decision to disapprove reimbursements.

We urge this Court to adopt the reasoning and decision of the Third Circuit expressed in *Wilmington,* not the decision of the Eighth Circuit in this case, and conclude that the district court below did not have jurisdiction over the subject of this action.

CONCLUSION

This action should be dismissed for lack of jurisdiction over the petitioners because of the Eleventh Amendment, for lack of subject matter jurisdiction under 28 U. S. C. § 1331 and because review is barred by § 1122 (f).

If not so dismissed, the decision of the circuit court should be reversed because its holding that First Federal was denied due process of law is inconsistent with prior decisions of this Court.

Respectfully submitted,

BURKE E. CASARI, individually and as Director of the Section of Hospital and Medical Facilities of the Nebraska Department of Health; and HENRY D. SMITH, individually and as Director of the Nebraska Department of Health, Petitioners

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Appendix

APPENDIX

EXHIBIT A

667 FEDERAL REPORTER, 2d SERIES

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN,
a corporation,

Appellee,

vs.

Burke E. CASARI, individually and as Director of the Section of Hospital and Medical Facilities of the Nebraska Department of Health; Henry D. Smith, individually and as Director of the Nebraska Department of Health,

Appellants.

No. 81-1284.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 13, 1981.

Decided Jan. 6, 1982.

* * *

Before HEANEY and STEPHENSON, Circuit Judges, and OLIVER,* Senior District Judge.

STEPHENSON, Circuit Judge.

Appellants, defendants in the court below, Burke E. Casari, Director of the Section of Hospital and Medical Facilities of the Nebraska Department of Health, and Henry D. Smith, Director of the Nebraska Department

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*The Honorable John W. Oliver, United States Senior District Judge for the Western District of Missouri, sitting by designation.

of Health, seek to overturn the district court's[1] order imposing declaratory injunctive relief upon them in both their individual and administrative capacities stemming from their review of the plaintiff's, First Federal Savings and Loan Association of Lincoln, health care proposal submitted under section 1122 of the Social Security Act, 42 U. S. C. § 1320a-1 (1976 & Supp. II 1978). Because we find that the defendants were altogether without authority to act upon this proposal, we both affirm in part and reverse in part the judgment of the district court.

I.[2]

> Section 1122 of the Social Security Act, provides: to assure that Federal funds appropriated under subchapters V, XVIII, and XIX of [the Social Security Act, 42 U. S. C. §§ 301 *et seq.*] are not used to support unnecessary capital expenditures * * * which are reimbursed under any of such subchapters and that, to the extent possible, reimbursement * * * shall support planning activities with respect to health services and facilities in the various States.

42 U. S. C. § 1320a-1(a) (Supp. II 1978). The statute and regulations promulgated thereunder, 42 C.F.R. §§ 100.101-100.109 (1980), establish a comprehensive system of coordinated state and federal review of proposed health-care capital expenditures through which qualifying institutions can receive federal reimbursement for capital expenditures. Under this system, the Secretary of Health, Education and Welfare (now Health and Human Serv-

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1. The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

2. The case was submitted to the district court upon a stipulated record.

ices) [hereinafter cited as Secretary] is authorized to enter into an agreement with individual states to provide for local review of all proposed reimbursable health care capital expenditures in order to assess conformity with local standards, criteria or plans developed to meet the need for adequate health care facilities in the state.[3] 42 U. S. C. § 1320a-1(b) (Supp. II 1978). Additionally, the agreement is to provide for specific notification and review procedures for subject proposals, such procedures to be established and maintained by the individual states. 42 C. F. R. § 100.106(a)(1) (1980). Within each cooperating state, a designated planning agency (DPA) is established to review each capital expenditure proposed by a health care facility and submit all findings and recommendations thereon to the Secretary. 42 U. S. C. § 1320a-1(b)(1) (Supp. II 1978). Adverse findings and recommendations of the DPA may be appealed and an opportunity for a fair hearing granted to any person proposing such a capital expenditure. *Id.* § 1320a-1(b)(3). However, to the extent that the findings and recommendations of

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3. The local standards, criteria or plans shall include the following criteria:

> (a) Whether the proposed project is needed or projected as necessary to meet the needs in the community in terms of health services required * * *;
>
> (b) Whether the proposed project can be adequately staffed and operated when completed;
>
> (c) Whether the proposed capital expediture is economically feasible and can be accommodated in the patient charge structure of the health care facility * * * without unreasonable increases; and
>
> (d) Whether the project will foster cost containment or improved quality of care through improved efficiency and productivity * * *.

42 C. F. R. § 100.107 (1980).

the designated appeal agency reverse or revise those of the DPA, the appeal agency's findings shall supercede those of the DPA. 42 C. F. R. § 100.106(c)(4) (1980). Furthermore, although the statute is silent on this point, the regulations provide that where judicial review of the appeal agency's decision is obtained, the judicial decision obtained thereby shall also supercede the findings and recommendations of the DPA. *Id.*

The DPA may find that a proposed capital expenditure is either in conformance or nonconformance with the applicable local standards, criteria or plans. *Id.* § 100.106 (a)(4). It may also elect not to review a proposal. Such an election, however, is deemed equivalent to a finding of conformity, the report of which to the Secretary must identify the reasons for such nonreview.[4]

Where the DPA finds and so notifies the Secretary that a proposed capital expenditure does not conform to local standards, the Secretary is authorized to exclude from federal health care reimbursements to the facility any amount attributable to depreciation, interest on borrowed funds, return on equity or other capital expenditures related to the proposed expenditure. 42 U. S. C. § 1320a-1(d)(1) (1976 & Supp. II 1978). Even despite a notice of nonconformity, however, the Secretary may nevertheless decide not to exclude these capital expenditures from federal reimbursement where sufficient proof of capability to provide efficient, effective and economical delivery of health care is demonstrated. *Id.* § 1320a-

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4. The failure of the DPA to notify the proponent within the prescribed period is also deemed a determination of conformity. *Id.* § 100.106 (a) (4).

1(d)(2) (Supp. II 1978). The Secretary's final determination is not subject to administrative or judicial review. *Id.* § 1320a-1(1)(f).

Section 1122 was enacted on October 30, 1972, and became effective on December 31, 1972. Thereafter, an agreement was entered into between the Secretary and the state of Nebraska on February 27, 1973, designating the Section of Hospital and Medical Facilities of the Department of Health as the designated planning agency (DPA) authorized to conduct section 1122 reviews within the state of Nebraska. The Department of Health was designated as the appropriate appeal and hearing agency.

The federal rules implementing section 1122 became effective on December 13, 1973. However, the Nebraska standards and rules for implementing such reviews, promulgated within Rule 34 of the Nebraska Department of Health, did not become effective until December 16, 1978, nearly six years after the date of the section 1122 agreement with the state.

On March 28, 1972, the First Federal Savings and Loan Association of Lincoln (First Federal) made a loan commitment in the amount of $543,750 to the Davenport Construction Company for the construction of a nursing home facility to be built in Falls City, Nebraska. The loan was secured in part, by a first mortgage on the property and a further security interest in certain furniture and fixtures. Construction of the facility was initiated in May 1972, and completed at an estimated appraised value of $725,000, exclusive of furniture and fixtures, on November 10, 1972, when ownership was then transferred to the Falls City Care Corporation. The facility was opened

on November 30, 1972, and operated as a state-licensed, intermediate care facility until June 1, 1977, when it was closed.[5] Thereafter, in lieu of foreclosure of its mortgage, the outstanding principal balance of which was $518,274.77, First Federal acquired title to the facility on December 12, 1977.[6]

In early October 1978, First Federal contacted the defendants through the Section of Hospital and Medical Facilities of the Nebraska Department of Health concerning the reopening of the facility and subsequently submitted a formal health care proposal on October 16, 1978. However, after preliminary review and revision, First Federal was ultimately notified in a letter from the DPA dated January 5, 1979, that its health care proposal was not in conformance with the standards, criteria or plans developed pursuant to section 1122.

As a result of this notification of nonconformity, a public hearing was held on March 14, 1979, before the Appeal Hearing Board of the State Board of Health. Through a letter dated April 25, 1979, First Federal was notified of the Appeal Board's decision to affirm the recommendation of nonconformity issued by the Section of Hospital and Medical Facilities:

> because of the failure of [the proposal] to demonstrate sufficient evidence that the project [was] needed or projected as necessary to meet the needs

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5. During this initial period of operation, the facility received federal Medicare and Medicaid capital reimbursement based upon $725,000 capital expenditure.

6. Since acquisition of legal title by First Federal, capital expenditures of less than $30,000 have been incurred for the facility.

of the community in terms of health services required * * *.

The Secretary was thereafter notified of the DPA's recommendation that the amounts attributable to capital expenditures of $514,000 incurred by First Federal be excluded from the capital reimbursement provisions of section 1122. This action was then filed by First Federal on May 23, 1979. On June 5, 1979, the Secretary determined that $514,000 expended in reopening the facility would be excluded from section 1122 reimbursement for capital expenditures.[7]

First Federal's complaint alleged violations of both constitutional and federal statutory rights. Specifically, First Federal alleged, *inter alia*, that, in accordance with sections 84-905.01[8] and 84-906[9] of the Nebraska Revised

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7. Had First Federal's proposal been deemed subject to § 1122 reimbursement, the expected recoupment over the life of the facility would have exceeded $200,000.

8. A copy of each amendment or rule to be adopted under this act, prior to the date of filing with the Secretary of State and the Revisor of Regulations, shall be submitted to the Attorney General for his consideration as to the statutory authority and constitutionality of such amendment or rule, and his approval or disapproval thereof. If the amendment or rule to be filed is approved as to legality by the Attorney General, he shall so indicate with his stamp of approval which shall be dated and signed.

Neb. Rev. Stat. § 84-905.01 (1976).

9. No rule of any agency shall be valid as against any person until five days after such rule has been filed with the Revisor of Regulations. No rule required under this act to be filed with the Secretary of State and Revisor of Regulations shall remain valid as against any person until the certified copy of the rule shall have been so filed on the date designated and in the form prescribed by the

(Continued on following page)

Statutes, the defendants were without power to act upon the health care capital expenditure proposal until December 16, 1978, due to their failure to have adopted administrative rules, standards criteria or plans for evaluating health care proposals and, therefore, the defendants' action upon the proposal represented an unconstitutional deprivation of First Federal's civil and property rights in federal reimbursements without due process of law. Furthermore, First Federal alleged that the defendants' conduct violated its federal statutory right under section 1122 to receive capital expenditure reimbursement. After receiving briefs and oral arguments, on February 6, 1981, the district court issued an order and memorandum which permanently enjoined the defendants from submitting a finding to the Secretary that First Federal's health care proposal was not in conformance with the provisions of section 1122. Additionally, the court directed the defendants to notify the Secretary that the health care proposal was, in fact, in conformity with the provisions of section 1122 and that the earlier, contrary notice of nonconformity should be considered void and withdrawn.[10]

(Continued from previous page)

Revisor of Regulations. The filing of any rule as herein provided shall give rise to a rebuttable presumption that it was duly and legally adopted.

Neb. Rev. Stat. § 84-906 (1976).

10. IT IS ORDERED AND ADJUDGED:

1. That judgment be and hereby is entered declaring that the defendants have been and are without authority to submit and are permanently enjoined from submitting a finding to the Secretary of Health and Human Services that the plaintiff's health project proposal for the reopen-

(Continued on following page)

II.

On appeal, the defendants argue that: (1) section 1122 precludes judicial review of state administrative health care reviews; (2) First Federal was not prejudiced nor denied due process or equal protection by the reviewing procedure instituted by the DPA; and (3) the action is nonetheless barred by the Eleventh Amendment.[11]

(Continued from previous page)

ing of a health care facility, which proposal was delivered on October 16, 1978, to the Division of Hospital and Medical Facilities of the Department of Health of the State of Nebraska, is not in conformity with the provisions of 42 U. S. C. § 1320a-1, § 1122 of the Social Security Act;

2. That the defendants shall submit to the Secretary of Health and Human Services a finding that the plaintiff's health project proposal is in conformity with the provisions of 42 U. S. C. § 1320a-1, § 1122 of the Social Security Act, and advise the Secretary that the notice of nonconformity dated May 24, 1979, should be considered withdrawn and void; * * *.

First Federal Savings & Loan v. Casari, No. CV79-L-132 (D. Neb. Feb. 9, 1981) (order accompanying memorandum of decision).

11. First Federal's complaint was brought under 28 U. S. C. § 1331 (a) (1976). Accordingly, the defendants further argue that subject matter jurisdiction is lacking in this case because the district court's decision was founded upon an interpretation of state law and, as a result, no federal question is presented. We need not dwell on this issue, for the complaint explicitly alleged both federal *constitutional* and statutory violations of a not insubstantial nature.

While we express no opinion as to whether the complaint presented a federal question through its allegation of federal statutory violations, we find that the allegations of an unconstitutional denial of due process rather clearly presented a substantial, non-frivolous question arising under the Constitution. *See, e.g., Bell v. Hood*, 327 U. S. 678, 683-85, 66 S. Ct. 773, 776-77, 90 L. Ed. 939 (1946). Although the district court was required to look to state law to ascertain whether the defendants were within their power to act upon First Federal's health care proposal, resolution of that issue did not preclude further inquiry as to whether the defendants' unauthorized review of the proposal violated the constitutional guarantees of due process and equal protection.

Defendants' argument that section 1122 precludes judicial review is premised substantially on the language of subsection (f) of the statute, 42 U. S. C. § 1320a-1(f) (1976), which states that "[a] determination by the Secretary * * * shall not be subject to administrative or judicial review." They argue essentially that inasmuch as the Secretary's final section 1122 decision is not subject to judicial review, it would be anomalous and improvident to allow judicial review of an intermediate state DPA recommendation.

This argument is not without substantial support. In *Wilmington United Neighborhoods v. United States Department of Health, Education and Welfare*, 615 F. 2d 112 (3d Cir.), *cert. denied*, — U. S. —, 101 S. Ct. 90, 66 L. Ed. 2d 30 (1980), the Court of Appeals for the Third Circuit, over the strong dissent of Judge Adams, held that while section 1122(f) does not *expressly* preclude judicial review of DPA determinations, such nonreviewability could be inferred from the statute's purpose and legislative history. *Id.* at 119-21.

The court in *Wilmington* founded its holding of nonreviewability upon consideration of the dual congressional intentions to limit federal reimbursements of health care capital expenditures to those "'*deemed necessary by the state*' and to encourage 'rational health planning *by the states.*'" *Id.* (quoting *NAACP v. Medical Center, Inc.*, 584 F. 2d 619, 627-28 (3d Cir. 1978) (emphasis in original)). Further, the court cited the legislative history of the act as evincing a congressional desire to not disturb the autonomy of state planning agencies. *Wilmington United Neighborhoods v. United States Department of*

Health, Education and Welfare, supra, 615 F. 2d at 120 (citing H. R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Admin. News, 4989, 5066). Reasoning that allowing judicial review of DPA determinations was the surest way to disturb this goal of state autonomy, the court declined to grant such review. *Wilmington United Neighborhoods v. United States Department of Health, Education and Welfare, supra*, 615 F. 2d at 120.[12]

In response, First Federal distinguishes the *Wilmington* opinion in that the court's holding therein as to the nonreviewability of DPA determinations can be narrowly limited to *substantive* versus *procedural* challenges to DPA determinations. Characterizing the instant challenge as one going to the power of the DPA to make its determination rather than the actual substantive determination itself, First Federal argues that *Wilmington* is inapplicable here.

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12. In further support of this holding, the court in *Wilmington* quoted the consonant reasoning of the lower court in that case:

> Given the prohibition on judicial review of the Secretary's decision set forth in Section 1122 (f), it is inconceivable that Congress could have intended the Federal Judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of a proposed capital expenditure.

Wilmington United Neighborhoods v. United States Dept. of Health, Educ. & Welfare, 615 F. 2d 112, 120 (3d Cir.), *cert. denied*, — U. S. —, 101 S. Ct. 90, 66 L. Ed. 2d 30 (1980), (quoting *Wilmington United Neighborhoods v. United States Dept. of Health, Educ. & Welfare*, 458 F. Supp. 628, 641 (D. Del. 1978)).

[1, 2] We agree with First Federal that DPA determinations are subject to judicial review regarding issues of procedural propriety and, therefore, find the *Wilmington* opinion distinguishable on that basis. See *Hollingsworth v. Harris*, 608 F. 2d 1026 (5th Cir. 1979) (per curiam). In *Hollingsworth*, an adverse section 1122 determination of the Secretary was challenged on procedural grounds for failure to provide public notice in accordance with 42 C. F. R. § 100.106(c) (1980). Despite the explicit statutory admonition of section 1122(f) that the decisions of the Secretary were not subject to judicial review, the Fifth Circuit held that such determinations were nonetheless judicially reviewable for procedural questions. *Hollingsworth v. Harris, supra*, 608 F. 2d at 1027. As noted by the court, even where otherwise withdrawn, judicial review of administrative agency determinations is always available to assure agency compliance with internal procedures. *Id.* (citing *Graham v. Caston*, 568 F. 2d 1092, 1097 (5th Cir. 1978)).[13] We think that this rationale is equally applicable to the procedural review of DPA actions.

Furthermore, the *Hollingsworth* opinion provides additional support for our holding, for in that case, the Fifth Circuit granted judicial review in the face of the explicit language of section 1122(f). Here, not only is there a glaring absence of statutory language in point, but the federal

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13. In *Graham v. Caston*, 568 F. 2d 1092, 1097 (5th Cir. 1978), the court held that "judicial review is available where [an] administrative agency fails to follow procedures outlined in regulations adopted by that administrative agency." *See also East Oakland-Fruitvale Planning Council v. Rumsfeld*, 471 F. 2d 524, 534 (9th Cir. 1972).

regulations adopted pursuant to the statute clearly imply that DPA determinations are *not* subject to the constraints of section 1122(f). *See* 42 C. F. R. § 100.106(e) (4) (1980).[14] Judicial reviewability will only be denied upon a "clear and convincing" showing of legislative intent. *Barlow v. Collins*, 397 U. S. 159, 167, 90 S. Ct. 832, 838, 25 L. Ed. 2d 192 (1970). Inasmuch as such a showing is absent with respect to the decisions of the DPA, we therefore hold that under section 1122, procedural challenges to the exercise of power by DPA's are subject to judicial review.[15]

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14. Any decision of a hearing officer, arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommendations of the designated planning agency: *Provided, That where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency.*

42 C. F. R. § 100.106 (c) (4) (1980) (emphasis added).

15. We recognize that *Wilmington United Neighborhoods v. United States Dept. of Health, Educ. & Welfare, supra*, 615 F. 2d at 118, rejected a similar "substance versus procedure" challenge to the *Secretary's* § 1122 determination and therefore may arguably conflict with our decision herein. Application of that portion of the *Wilmington* reasoning to the challenge presented in this case, however, appears to represent an attenuated assertion of mere dicta. Even though the *Wilmington* opinion may support the defendants' argument refuting even procedural review of DPA determinations, we adhere to our decision on this issue.

In so holding, however, we express no opinion as to whether § 1122 provides for substantive judicial review of DPA determinations.

[3] First Federal's challenge herein is that the defendants were entirely without power to act upon their claim because of their failure to have regulations in effect at the time the proposal was submitted. No claim is made that the substance of the local standards or review conducted thereunder was incorrect. The challenge is one going directly to the *power* of the DPA to act and, therefore, procedural in nature. As such, it falls within the purview of the class of DPA orders subject to review.

[4] The defendants further argue that despite their failure to have local rules and regulations in effect as required by the Nebraska Administrative Procedures Act, First Federal was not prejudiced by the DPA review of its proposal because the standards employed in the ultimate review were identical to those earlier promulgated in the federal regulations. This argument misses the point of First Federal's challenge. Section 84-906 explicitly states that "[*n*]*o* rule * * * shall be valid as against any person * * *" unless appropriately registered and filed. Neb. Rev. Stat. § 84-906 (1976) (emphasis added). *See* n. 9, *supra*. First Federal made its loan commitment on March 28, 1972. It acquired title to the facility on December 12, 1977, and the subject health care proposal was formally submitted on October 16, 1978. Yet, it was not until December 16, 1978, that Rule 34 of the Nebraska Department of Health, implementing section 1122 reviews within Nebraska, was effectuated. Rule 34 was therefore

invalid with respect to First Federal and the defendants were without authority to review the proposal.[16]

Section 1122 further requires that a health project proposal be submitted sixty days prior to incurring the obligation for capital expenditure. 42 U. S. C. § 1320a-1 (d)(1)(A) (1976 & Supp. II 1978). Failure to comply with this requirement can result in partial or total exclusion of otherwise reimbursable amounts. *Id.* Whether First Federal's obligation is interpreted as having been incurred in 1972, with the loan commitment or on December 12, 1977, when ownership interest in the facility was acquired, no applicable rules were in effect to encompass review of the subject proposal. We agree with the district court that this failure to have promulgated appropriate rules, as required by both statute and regulation, further prevented the defendants from acting upon First Federal's proposal. The defendants' subsequent conduct in nevertheless reviewing the proposal was entirely without authority, arbitrary and patently prejudicial to First Federal, therefore representing a clear denial of due process of law. *See, e. g., Wolff v. McDonnell*, 418 U. S. 539, 558, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974).

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16. The rule was not "appropriately registered and filed" and thus the DPA had no authority to conduct section 1122 review until December 16, 1979. The DPA dealt with First Federal as if it had the authority to conduct such a review when First Federal made the initial contact relative to reopening the nursing home, when the health project proposal was officially submitted, and when it requested and received more information concerning First Federal's application. At all of these times the DPA acted without authority. We agree with the district court that "[w]ithout having property promulgated the procedures required by § 1122, the designated planning agency was without power to act in relation to the plaintiffs' application." *First Federal Savings & Loan v. Casari*, No. CV79-L-132, slip op. at 6 (D. Neb. Feb. 9, 1981).

So determined, it follows that the defendants, being powerless to act upon First Federal's proposal, were also powerless to substantively approve the proposal. As a result, we agree with the district court that the defendants' determination of nonconformity was void, and a nullity and thus must be withdrawn. We cannot, for the same reasons, agree with that portion of the court's order affirmatively directing the defendants to notify the Secretary that the proposal was in fact in conformance with the provisions of section 1122. Lacking authority to review the proposal in any manner, the defendants could logically assess neither conformance nor nonconformance. Accordingly, the order below is reversed insofar as it directs the defendants to make an affirmative finding and notification of conformity.[17]

Affirmed in part, reversed in part.

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17. Having so reversed in part and affirmed in part the judgment of the district court, it is clear that this action is not barred by the proscriptions of the Eleventh Amendment. As established in *Quern v. Jordan*, 440 U. S. 332, 348-49, 99 S. Ct. 1139, 1149, 59 L. Ed. 2d 358 (1979), the Eleventh Amendment does not bar the imposition of a notice requirement which is merely ancillary to prospective or declaratory relief already ordered by the court and which does not require a retroactive payment of funds from the state treasury. The notice imposed by the district court below does not trigger any of the impermissible concerns reached by the amendment. It gives nothing more to the Secretary " 'than what [he] would have gathered by sitting in the courtroom.' " *Id.* at 349, 99 S. Ct. at 1149 (quoting *Jordan v. Trainor*, 563 F. 2d 873, 877-78 (7th Cir. 1977)).

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1284

September Term, 1981

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, A CORPORATION,

Appellee,

vs.

BURKE E. CASARI, ETC., ET AL.,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

On motion of appellants, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of sixty days from this date. If within that time there is filed with the Clerk of the Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

February 4, 1982

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, a corporation,

Plaintiff,

vs.

BURKE E. CASARI, individually and as Director of the Section of Hospital and Medical Facilities of the Nebraska Department of Health; HENRY D. SMITH, individually and as Director of the Nebraska Department of Health; * * *,

Defendants.

DECLARATORY JUDGMENT
AND PERMANENT INJUNCTION

(Filed February 9, 1981)

CV79-L-132

Pursuant to the accompanying memorandum of decision of today,

IT IS ORDERED AND ADJUDGED:

1. That judgment be and hereby is entered declaring that the defendants have been and are without authority to submit and are permanently enjoined from submitting a finding to the Secretary of Health and Human Services that the plaintiff's health project proposal for the reopening of a health care facility, which proposal was delivered on October 16, 1978, to the Division of Hospital and Medical Facilities of the Department of Health of the State of Nebraska, is not in conformity with the provisions of 42 U. S. C. § 1320a-1, § 1122 of the Social Security Act;

2. That the defendants shall submit to the Secretary of Health and Human Services a finding that the plaintiff's health project proposal is in conformity with the provisions of 42 U. S. C. § 1320a-1, § 1122 of the Social Security Act, and advise the Secretary that the notice of nonconformity dated May 24, 1979, should be considered withdrawn and void;

3. That the plaintiff Friendship Management Villa Co., Inc. is dismissed as a party to this action; and

4. That the costs of this action shall be awarded to the plaintiff.

Dated February 6, 1981.

BY THE COURT
/s/ Warren K. Urbom
Chief Judge

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, et al.,

Plaintiffs,

vs.

BURKE E. CASARI, et al.,

Defendants.

MEMORANDUM OF DECISION

(Filed February 9, 1981)

CV79-L-132

The plaintiffs, First Federal Savings and Loan Association of Lincoln and Friendship Villa Management Company, Inc., brought this action alleging violations of their federal constitutional and statutory rights stemming from the defendants' review of their health care proposal under § 1122 of the Social Security Act, 42 U. S. C. § 1320a-1. Pursuant to the agreement of the parties, filing 18, the case was submitted on a stipulated factual record. Briefs were submitted and oral arguments were heard on December 5, 1980.

Jurisdiction exists under 28 U. S. C. § 1331. The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

I.

The facts to which the parties have stipulated reflect that on March 28, 1972, the plaintiff First Federal made

a loan commitment in the amount of $543,750.00 for the construction and permanent financing of a nursing home facility to the Davenport Construction Company. The loan was secured by a promissory note from Davenport Construction Company for the amount of the loan, a first mortgage on the property for the loan amount, and an assignment of a lease granting a security interest in certain furniture and fixtures.

Construction of the facility was completed on November 10, 1972, and ownership was thereafter transferred to the Falls City Care Corp. The facility opened November 30, 1972, and operated until June 1, 1977, as a state-licensed intermediate care facility. The plaintiff First Federal acquired legal title to the facility on December 12, 1977, by a deed in lieu of foreclosure of its mortgage from the Falls City Care Corp. The outstanding principal balance on the mortgage at that time was $518,274.77. Since the acquisition of legal title by First Federal, capital expenditures of less than $30,000.00 have been incurred relative to the facility.

In early October, 1978, the plaintiff First Federal contacted the defendants concerning the reopening of the facility and a health care project proposal was submitted to the Southeast Nebraska Health Systems Agency and to the defendants on October 16, 1978. Pursuant to 42 C. F. R. § 100.106(a) (3), a notice of incompleteness was sent to the plaintiffs, who submitted a revised project application on November 20, 1978. In a letter dated January 5, 1979, the plaintiffs were notified of the project's inconsistency with § 1122 as determined pursuant to the defendants' evaluation of the proposal under the criteria set out in Rule 34 of the Nebraska Rules and Regulations for

Implementing Section 221 of Public Law 92-603 (42 U. S. C. § 1320a-1), § 1122 of the Social Security Act.

A hearing pursuant to 42 C. F. R. § 100.106(c) was held on March 14, 1979, before the Appeal Hearing Board of the State Board of Health, which issued its findings, conclusions and recommendations on April 9, 1979. The State Board of Health—the designated appeal agency—issued its findings, conclusions and decision on April 25, 1979. Form HRA-45 was submitted to the Secretary of Health, Education and Welfare by the defendants in late May of 1979, stating that the plaintiffs' proposal was a § 1122 expenditure of $514,000 subject to the agency's review. On June 5, 1979, the Secretary determined that $514,000 for reopening the facility would be excluded from payment for services provided by the facility under subchapters XVIII and XIX of Chapter 7, Tit. 42 U. S. C., relating to the medicare and medicaid programs.

Prior to June 1, 1977, the owners of the nursing home facility received reimbursement for capital expenditures under subchapters XVIII (Medicare) and XIX (Medicaid) based on a $725,000 capital expenditure. If not excluded by the Secretary pursuant to § 1122, and if the plaintiff otherwise complies with the provisions of the Social Security Act, it is entitled to reimbursement for capital expenditures incurred in the care of medicare and medicaid patients based on a capital expenditure of $518,274.77, plus capital expenditures incurred since December 12, 1977. It is expected that the reimbursements would exceed $200,000 over the life of the facility.

Section 1122 became effective on December 31, 1972. This section provides that the Secretary of Health, Edu-

cation and Welfare (now Health and Human Services) may deny reimbursement of capital expenditures to a health care facility upon the recommendation of the concerned state's designated planning agency that the proposal is inconsistent with the criteria adopted by it pursuant to § 1122. On February 27, 1973, a contract was entered into by the Secretary and the State of Nebraska, designating the Section of Hospital and Medical Facilities of the Department of Health as the agency authorized to conduct § 1122 reviews in Nebraska and the Board of Health as the appeal agency. The federal rules implementing § 1122 became effective on December 13, 1973, and on December 16, 1978, Rule 34 of the Department of Health implementing § 1122 reviews for Nebraska became effective, there having been no such rule approved by the Attorney General and Governor of Nebraska and filed with the revisor of regulations and the Secretary of State of Nebraska prior to December 12, 1978.

The plaintiffs filed this action after exhausting their state administrative remedies.

II.

As a preliminary matter the defendants argue that the court has no jurisdiction over the case. I shall not restate all my conclusions regarding jurisdiction in this case rendered in my memorandum and order of June 23, 1980, denying the defendants' motion to dismiss. The defendants' brief on the merits raises again, however, the contention that § 1122(f) precludes judicial review of a decision of the designated planning agency, citing *Wilmington United Neighborhoods v. United States Dept. of Health, Education and Welfare*, 615 F. 2d 112 (C. A. 3rd Cir.), cert. denied, — U. S. —, 49 U. S. L. W. 3246 (1980).

In the *Wilmington* case the court held that § 1122(f) precludes judicial review of not only the determinations made by the Secretary of Health and Human Services pursuant to § 1122 but also of the determinations of the designated planning agency. The court reasoned that although Congress did not expressly preclude review of designated planning agency determinations in § 1122(f), the legislative history indicates that § 1122 was enacted to contain health care costs by denying capital expenditure reimbursements to those facilities which the state has found unnecessary, and was not intended to intrude upon the autonomy of authority of state and local planning agencies. *Id.*, 615 F. 2d at 119-120. The court quoted the conclusion of the district court:

> ". . . Given the prohibition on judicial review of the Secretary's decision set forth in section 1122(f), it is inconceivable that Congress could have intended the Federal judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's *approval* of a proposed capital expenditure. . . ." (Emphasis added.)

458 F. Supp. 628, 641 (U. S. D. C. Del. 1978).

The court in *Wilmington* also discounted the distinction between procedural and substantive determinations made by the Secretary, as well as the argument that the issue there involved the *power* to make determinations and not the determination itself. However, in *Wilmington*—as in *Briscoe v. Bell*, 432 U. S. 404 (1977), which the court in *Wilmington* relied upon—whether termed procedural or substantive, the determinations involved were those of which the respective statutes precluded judicial review.

The present case, involving the issue of whether the designated planning agency had the authority to conduct a § 1122 review of the plaintiffs' health care proposal, does not initially involve the review of a determination by either the Secretary or the designated planning agency. The initial question presented is whether the designated planning agency has complied with § 1122 and the federal regulations implementing § 1122 so that it may engage in *any* § 1122 review of this health care proposal. These aspects of the statutory scheme do not concern the autonomy of the state and local agencies or the discretion vested in them or in the Secretary.

Section 1122 and the regulations issued thereunder require that certain agreements be entered into and that certain rules be enacted by the state before the Secretary is entitled to rely upon or is bound by the designated planning agency's determinations. Compliance with these enabling-type provisions is not a matter encompassed by the language of § 1122(f), whether or not that provision is construed to preclude judicial review of determinations made pursuant to § 1122 by the designated planning agency as well as determinations made by the Secretary. The statute does not vest in the Secretary or in the designated planning agency the authority to disregard the prerequisites to the exercise of authority under § 1122 by the designated planning agency. I remain convinced that § 1122(f) does not preclude judicial review of the procedures by which the designated planning agency claims to have qualified as an appropriate health care proposal review agency under § 1122. Finally, I note that at least some form of judicial review of decisions by designated

planning agencies is contemplated by 42 C. F. R. § 100.-106(c)(4), which provides:

> "Any decision of a hearing officer, arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommendations of the designated planning agency: *Provided,* That where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency."

III.

The primary thrust of the plaintiffs' attack is that the designated planning agency had no authority to review the plaintiffs' health care proposal under § 1122. The plaintiffs argue that prior to December 16, 1978, the designated planning agency had failed to adopt rules required to be adopted by § 1122, in accordance with Nebraska's Rules of Administrative Agencies, §§ 84-901 through 84-919, R. R. S. Neb. (Reissue 1976), and therefore the designated planning agency had no jurisdiction to conduct a § 1122 review of the plaintiffs' health care proposal.

A.

In *Nebraska Methodist Hospital v. Casari,* CV77-L-256, (unreported memorandum of decision 8-18-78, U. S. D. C. Neb.) I noted that the rules required by § 1122 to be promulgated are outlined in 42 U. S. C. § 1230a-1(b)(3) and 42 C. F. R. § 101.106(a)(1) and that they include procedures by which a fair hearing may be had upon an ap-

peal from a designated planning agency decision adverse to the applicant and the procedures under which timely written notice of intent to make a § 1122 capital expenditure may be given.

It is undisputed in the present case that such rules were not effective until December 16, 1978. Therefore, § 84-906, R. R. S. Neb. (Reissue 1976), states that such rules were not valid as against any person until that date. The following conclusions reached by me in the *Nebraska Methodist Hospital* case are applicable to the present factual situation:

> "Clearly, the federal government cannot authorize a state agency to act where it could not otherwise act. I do not believe that is the import of the federal statute involved here. However, there is nothing in either the federal or state statutes which convinces me that a state agency can dispense with the normal requirements of state law when that agency is acting in cooperation with the federal government. The fact remains that the designated planning agency . . . is a state agency. Simply because the State of Nebraska has chosen to take advantage of the provisions of the federal statute does not mean that state law is no longer relevant. Thus, if the entity acting as the designated planning agency would otherwise be required to follow the dictates of Nebraska's Rules of Administrative Agencies, it will be required to do so here.
>
> * * *
>
> Having failed to promulgate the rules as required by state law, the rules are invalid. The designated planning agency then stands in the position of not having adopted procedures required by the federal statutes and regulations. I agree with the plaintiffs that *until* the regulations are promulgated in an appropriate manner, the designated planning agency is without

power to act under the provisions of 42 U. S. C. § 1320a-1."

The designated planning agency was not empowered to act as a review agency under § 1122 until December 16, 1978. Not until that time were procedures implemented pursuant to which a health care proposal could be submitted for review under properly promulgated states rules and procedures. It would appear, therefore, that the designated planning agency was without power to issue an adverse recommendation regarding a health care proposal *prior* to December 16, 1978. This does not end the inquiry, however.

B.

The defendants do not argue factually with the conclusion that there was no valid agency rule regarding the giving of notice of intent to incur a capital expenditure at the time of the submission of the plaintiffs' application. They argue instead that the plaintiffs were not prejudiced by the designated planning agency's failure to have promulgated the rule in accordance with the state's Rules of Administrative Agencies, since the designated planning agency's adverse determination was not based upon the plaintiffs' failure to give timely notice pursuant to the requirements of § 1122(d)(1)(A). However, this argument ignores the requirements relating to the promulgation of "procedures under which timely written notice of the intention to make a capital expenditure subject to this subpart is required to be given." 42 C. F. R. § 100.106(a)(1).

Title 42 C. F. R. § 100.106(a)(1) speaks in mandatory language, delineating the requisites of agreements be-

tween the Secretary and the states with which the Secretary contracts. It clearly requires the establishment of certain procedures by the designated planning agency. Similarly, § 1122(d)(1) states that where notice is not received at least sixty days prior to obligation for a reviewable capital expenditure:

> ". . . then for such period as he finds necessary in any case to effectuate the purpose of this section, [the secretary] *shall,* in determining the Federal payments to be made under subchapters V, XVIII, and XIX of this chapter with respect to services furnished in the health care facility for which such capital expenditure is made, *not include* any amount which is attributable to depreciation, interest on borrowed funds, a return on equity capital . . . or other expenses related to such capital expenditure. . . ." (Emphasis added.)

I cannot agree, therefore, with the characterization implicit in the defendants' argument that this sixty-day notice provision is not prejudicial to an applicant who fails to comply with it. In view of the clear and direct requirement that the Secretary deny reimbursements to tardy applicants unless he or she makes a finding pursuant to § 1122(d)(2), it appears that the requirement in 42 C. F. R. § 100.106(a)(1) relating to the promulgation of procedures by the designated planning agency relating to the giving of notice is an important and integral feature of the stream-lined § 1122 statutory scheme. The notice procedures assure that appropriate review will be made of reviewable capital expenditures, since failure to give timely notice requires the Secretary to exclude such expenditures from the computation of the reimbursements to the health care facilities. The notice procedures also

protect the applicant by identifying the method by which the applicant may comply with the sixty-day requirement and the elements which the notice must contain in order to be effective under § 1122.

Without having properly promulgated the procedures required by § 1122, the designated planning agency was without power to act in relation to the plaintiffs' application.

C.

The defendants also argue that their failure to have properly promulgated rules specifying the criteria to be applied to the plaintiffs' application at the time the application was submitted does not invalidate the designated planning agency's review, because the designated planning agency's rules had become effective prior to the date that the designated planning agency's recommendation was made to the Secretary. They argue that since Rule 34 of the Department of Health incorporates the criteria set out in 42 C. F. R. §§ 100.107(a)-(d) by reference, the plaintiffs had sufficient notice of the criteria by which their application would be evaluated and therefore they were not injured by the designated planning agency's failure to have properly promulgated the rules prior to the submission of the plaintiffs' application. A similar argument is made relating to the failure to have properly promulgated rules pursuant to § 1122(b) (3) concerning appeal hearings. They state that Rule 34 of the Department of Health was in effect at the time the plaintiffs appealed the designated planning agency's determination.

Even if these arguments were sufficient to overcome the plaintiffs' contentions regarding the designated plan-

ning agency's authority to act on their application, that would not cure the lack of authority resulting from the defendants' failure to have established procedures relating to the sixty-day notice provisions.

IV.

The defendants have also argued that this action should be dismissed because it is in reality a suit against the State of Nebraska and because the relief prayed for is barred by the Eleventh Amendment.

A.

The Eleventh Amendment, in addition to barring suits against a state by citizens of another state or citizens of any foreign state, bars federal court suits against an unconsenting state brought by its own citizens. See *Edelman v. Jordan*, 415 U. S. 651, 662-663 (1974), and *Hans v. Louisiana*, 134 U. S. 1 (1890). In *Ex Parte Young*, 209 U. S. 123 (1908), the Supreme Court reaffirmed the following established principle:

> ". . . [*I*]*ndividuals* who, *as* officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, *may be enjoined* by a Federal Court of equity *from* such action."
>
> 209 U. S. at 155-156

Thus, although a suit against the state is barred by the Eleventh Amendment, the bringing of a suit for injunctive relief against state officials in their official capacities is not necessarily barred. *Hutto v. Finney*, 437 U. S. 678, 690 (1978).

It is apparent here that the plaintiffs are in fact seeking an equitable remedy—an injunction against the defendant state officials. This fact alone does not automatically remove Eleventh Amendment issues from the suit.

> ". . . It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Co. v. Department of Treasury*, 323 U. S. 459 (1945), the Court said:
>
> > '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' *Id.*, at 464.
>
> "Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. . . ."
>
> *Edelman v. Jordan*, supra, 415 U. S. at 663.

The court in *Edelman* went on to observe that the labeling of a remedy as equitable in nature does not automatically make inapplicable the Eleventh Amendment's prohibition. It noted that in deciding *Ex parte Young*, the court had distinguished a line of cases seeking equitable relief in the form of specific performance of contracts to which a state was a party.

> ". . . A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and *a decree in favor of plaintiff would affect the treasury* of the State." (Emphasis added.)
>
> 209 U. S. at 151.

Thus, the court in *Edelman* struck down the lower court's equitable restitution remedy.

> ". . . It [required] payment of state funds, not as a necessary consequence of compliance *in the future* with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."
>
> 415 U. S. at 668.

The relief sought in the present action consists of none of the characteristics which the courts have found inimical to the purposes of the Eleventh Amendment. No argument is made that the requested relief would have any impact upon the treasury of the State of Nebraska. The relief is injunctive in nature and is similar to the prospective relief awarded by the district court and upheld by the Supreme Court in *Quern v. Jordan*, 440 U. S. 332 (1979). The Court of Appeals had stated that the "District Court could order the state officials to send a 'mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable no-

tice of appeal form could also be provided.'" 440 U. S. at 336.

B.

The defendants' argument that the suit is barred by the Eleventh Amendment because the individuals are in reality the alter ego of the State of Nebraska also fails. It is in this type of circumstance that the doctrine of *Ex parte Young* strips the state officials of the sovereign immunity otherwise available to them and subjects them to suits by other parties. The defendants' argument in this regard is unpersuasive.

V.

Judgment will be entered for the plaintiff First Federal and the relief prayed for will be granted. Pursuant to filing 18 the plaintiff Friendship Villa Management Co., Inc. will be dismissed as a party to the suit.

Dated February 6, 1981.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, a corporation,

Plaintiff,

vs.

BURKE E. CASARI, Individually and as Director of the Section of Hospital and Medical Facilities of the Nebraska Department of Health; HENRY D. SMITH, Individually and as Director of the Nebraska Department of Health,

Defendants.

CV79-L-132

ORDER

(Filed March 24, 1981)

Good cause for stay having been shown, the court hereby grants defendants' Motion for Stay of the Declaratory Judgment and Permanent Injunction of this court filed on February 9, 1981, pending appeal of this case to the Circuit Court of Appeals for the Eighth Circuit and until such appeal is terminated.

Dated this 23rd day of March, 1981.

/s/ Warren K. Urbom
Chief Judge

EXHIBIT F

§ 1320a-1. Limitation on use of Federal funds for capital expenditures—Use of reimbursement for planning activities for health services and facilities.

(a) The purpose of this section is to assure that Federal funds appropriated under subchapters V, XVIII, and XIX of this chapter are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any of such subchapters and that, to the extent possible, reimbursement under such subchapters shall support planning activities with respect to health services and facilities in the various States.

(b) The Secretary, after consultation with the Governor (or other chief executive officer) and with appropriate local public officials, shall make an agreement with any State which is able and willing to do so under which a designated planning agency * * * will—

(1) make, and submit to the Secretary * * * findings and recommendations with respect to capital expenditures proposed by or on behalf of any health care facility in such State within the field of its responsibilities,

* * *

(3) establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the designated agency and will be granted an opportunity for a fair hearing by such agency or person other than the designated agency as the Governor (or other chief executive officer) may designate to hold such hearings.

* * *

Manner of payment to States for carrying out agreement

(c) • • •

Determination of amount of exclusions from Federal payments

(d)(1) Except as provided in paragraph (2), if the Secretary determines that—

(A) neither the planning agency designated in the agreement described in subsection (b) of this section nor any agency described in clause (ii) of subparagraph (B) of this paragraph had been given notice of any proposed capital expenditure (in accordance with such procedure or in such detail as may be required by such agency) at least 60 days prior to obligation for such expenditure; or

(B)(1) the planning agency so designated or an agency so described had received such timely notice of the intention to make such capital expenditure and had, within a reasonable period after receiving such notice and prior to obligation for such expenditure, notified the person proposing such expenditure that the expenditure would not be in conformity with the standards, criteria, or plans developed by such agency or any other agency described in clause (ii) for adequate health care facilities in such State or in the area for which such other agency has responsibility, and

(ii) the planning agency so designated had, prior to submitting to the Secretary the findings referred to in subsection (b) of this section—

(I) consulted with, and taken into consideration the findings and recommendations of, the State planning agencies • • • as well as the public or nonprofit private agency or organization responsible for the comprehensive regional, metropolitan area, or other local area plan or plans, • • • and

(II) granted to the person proposing such capital expenditure an opportunity for a fair hearing with respect to such findings;

then, for such period as he finds necessary in any case to effectuate the purpose of this section, he shall, in determining the Federal payments to be made under subchapters V, XVIII, and XIX of this chapter with respect to services furnished in the health care facility for which such capital expenditure is made, not include any amount which is attributable to depreciation, interest on borrowed funds, a return on equity capital (in the case of proprietary facilities), or other expenses related to such capital expenditure. • • •

(2) If the Secretary, after submitting the matters involved to the advisory council established or designated under subsection (i) of this section, determines that an exclusion of expenses related to any capital expenditure of any health care facility would discourage the operation or expansion of such facility, which has demonstrated to his satisfaction proof of capability to provide comprehensive health care services (including institutional services) efficiently, effectively, and economically, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective administration of subchapter V, XVIII, or XIX of this chapter, he shall not exclude such expenses pursuant to paragraph (i).

Treatment of lease or comparable arrangement of any facility or equipment for facility in determining amount of exclusions from Federal payments

(e) • • •

Reconsideration by Secretary of determinations

(f) Any person dissatisfied with a determination by the Secretary under this section may within six months

following notification of such determination request the Secretary to reconsider such determination. A determination by the Secretary under this section shall not be subject to administrative or judicial review.

Definition

(g) For the purposes of this section, a "capital expenditure" is an expenditure which, under generally accepted accounting principles, is not properly chargeable as an expense of operation and maintenance and which (1) exceeds $100,000, (2) changes the bed capacity of the facility with respect to which such expenditure is made, or (3) substantially changes the services of the facility with respect to which such expenditure is made. * * *

Applicability to Christian Science sanatoriums

(h) * * *

National advisory council; establishment or designation of existing council; functions; consultations with other appropriate national advisory councils; composition; compensation and travel expenses

(i)(1) The Secretary shall establish a national advisory council, or designate an appropriate existing national advisory council, to advise and assist him in the preparation of general regulations to carry out the purposes of this section. * * *

(2) * * *

(3) * * *

EXHIBIT G

SUBCHAPTER I—MEDICAL CARE QUALITY AND COST CONTAINMENT

Part 100—Cost Containment and Quality Control

Subpart A—Limitation on Federal Participation for Capital Expenditures

§ 100.101 Applicability.

The provisions of this subpart are applicable to agreements entered into by the Secretary with the various States pursuant to section 1122 of the Social Security Act (42 U.S.C. Chap. 7), and to determinations made by the Secretary thereunder. • • •

§ 100.102 Definitions.

(a) "Act" means the Social Security Act, as amended (42 U.S.C. Chap. 7).

(b) "State" means any of the several States. • • •

(c) "Secretary" means the Secretary of Health, Education, and Welfare. • • •

(d) "Person" means • • • a corporation. • • •

(e) "Health care facility" includes • • • skilled nursing facilities, • • • intermediate care facilities, • • •.

(1) • • •

(2) • • •

(3) • • •

(4) The term "skilled nursing facility" means an institution or a distinct part of an institution which is primarily engaged in providing to inpatients skilled nursing care and related services for patients who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.

(5) The term "intermediate care facility" means an institution which provides, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require health-related care and services (above the level of room and board).

(6) • • •

• • •

§ 100.103 Expenditures covered.

Any capital expenditure proposed by or on behalf of any health care facility or health maintenance organization, the obligation for which is incurred by or on behalf of a health care facility or health maintenance organization after December 31, 1972, or after the effective date of the agreement entered into pursuant to § 100.104 by the Secretary and the State in which the health care facility or health maintenance organization is located (which effective date may, at the option of the State, be earlier than the date on which such agreement is entered into where the Secretary finds that the procedure utilized by the State for review of proposed capital expenditures as of such earlier date satisfies the requirements of section 1122 and this subpart), whichever is later, is subject to this subpart: • • •

(a)(1) For purposes of this subpart, a "capital expenditure" is an expenditure, • • • which, under

generally accepted accounting principles, is not properly chargeable as an expense of operation and maintenance and which (i) exceeds $100,000, or (ii) changes the bed capacity of the facility with respect to which such expenditure is made, or (iii) substantially changes the services of the facility with respect to which such expenditure is made.

* * *

(e) Obligation: An obligation for a capital expenditure shall be deemed to have been incurred by or on behalf of a health care facility or health maintenance organization.

(1) When an enforceable contract is entered into by such facility or organization or by a person proposing such capital expenditure on behalf of such facility or organization for the construction, acquisition, lease or financing of a capital asset; or

* * *

§ 100.104 Agreement; general.

The Secretary, after consultation with the Governor (or other chief executive officer) and with appropriate public officials, shall make an Agreement with any State which is able and willing to enter into such an agreement under which a designated planning agency * * * will submit to the Secretary, together with such supporting materials as the Secretary may require, the following:

(a) With respect to each capital expenditure proposed by or on behalf of a health care facility or health maintenance organization in such State, the finding of such designated planning agency as to whether

(1) The designated planning agency or any other agency described in § 100.105 had been given notice of such proposed capital expenditure (in accord-

ance with such procedure or in such detail as may be required pursuant to § 100.106) at least 60 days prior to obligation for such expenditure; and

(2) Such expenditure is or is not consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act (or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963) to meet the need for adequate health care facilities in the area covered by the plan or plans so developed.

• • •

(b) With respect to each proposed capital expenditure which is found by the designated planning agency to be not consistent with the standards, criteria, or plans described in paragraph (a) of this section, its recommendation as to whether the Secretary should either

(1) Exclude, in determining the Federal payments to be made under titles V, XVIII, and XIX of the Act with respect to services furnished in the health care facility or health maintenance organization for which such capital expenditure is made, expenses related to such capital expenditure (in accordance with section 1122(d) (1) of the Act); or

(2) Not exclude such expenses, on the ground that such facility or organization has demonstrated proof of capability to provide comprehensive health care services efficiently, effectively, and economically, and that such an exclusion would discourage the operation or expansion of such facility or organization, or of any facility of such organization.

• • •

§ 100.105 Agreement; designated agency.

• • •

§ 100.106 Agreement; procedures for agency review.

(a) The Agreement shall provide for the following notification and review procedures:

(1) The designated planning agency shall establish, maintain, and disseminate to all health care facilities and health maintenance organizations within the State procedures under which timely written notice of the intention to make a capital expenditure subject to this subpart is required to be given * * *. Such notice shall set forth the date on which the obligation is expected to be incurred, and must be received by the designated planning agency not less than 60 days prior to such date.

(2) Such notice shall be submitted in such form and manner and shall contain such information as may be required by the designated planning agency * * *

(3) If the notice under this paragraph is found by the designated planning agency to be incomplete, such agency shall notify the person proposing the capital expenditure within 15 days of its receipt of such incomplete notice, advising such person of the additional information required. Where such timely notification of incompleteness is provided, the period within which the agency is required to notify the person proposing such expenditure that such expenditure is not approved, as required by section 1122(d)(1)(B)(i) of the Act and paragraph (a)(4) of this section, shall run from the date of receipt by the agency of a notice containing such additional information.

(4) Except as provided in paragraph (a)(3) of this section, the designated planning agency shall, prior to the date set out in the written notice of intention submitted pursuant to paragraph (a)(1) of this section as the expected date for the obligation of the proposed expenditure (but, subject to the provisions of paragraph (a)(3) of this section in no event later than 90 days after the receipt of such notice unless the person proposing the capital expendi-

ture agrees to a longer period), provide written notification to the person proposing such capital expenditure * * *.

(c) In addition to any other hearing which may be provided by an agency described in § 100.105 in connection with the review of a proposed capital expenditure under this subpart, the Agreement shall provide that the designated planning agency will grant to a person proposing a capital expenditure an opportunity for a fair hearing with respect to the findings and recommendations of the designated planning agency, and will establish and maintain procedures for such appeal. Such procedures shall include the following:

(1) The request for a hearing must be made in writing, to the designated planning agency, within 30 days after the date on which the person proposing the capital expenditure receives notice of an adverse finding or recommendation of the designated planning agency.

(2) The hearing shall be commenced within 30 days after receipt of the request * * * and shall be conducted in accordance with the applicable requirements of State law and by such agency or person, other than the designated planning agency, as the Governor (or other chief executive officer of the State) may designate for that purpose: *Provided*, That no agency which or person who has taken part in any prior consideration of or action upon the proposed capital expenditure may conduct such hearing.

(i) The hearing shall be open to the public and shall be publicized through local newspapers and public information channels.

(ii) The person proposing the capital expenditure, the other agencies described in § 100.105, and other interested parties, including representatives of consumers of health services, shall be permitted to give testimony and present arguments at the hearing.

(iii) A record of the proceedings shall be kept * * *.

(3) As soon as practicable, but not more than 45 days after the conclusion of a hearing, the hearing officer shall notify the person who requested the hearing * * * of his decision and the reasons therefor.

* * *

(4) Any decision of a hearing officer arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommendations of the designated planning agency: *Provided*, That where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency.

* * *

§ 100.107 Agreement: criteria for agency review.

The Agreement shall set forth the criteria under which the designated planning agency and the other agencies described in § 100.105 shall evaluate proposals for capital expenditures for purposes of this subpart to determine their conformance with the applicable standards, criteria and plans referred to in § 100.104(a)(2). Such criteria, to the extent provided for under such standards, criteria, or plans, shall include the following:

(a) Whether the proposed project is needed or projected as necessary to meet the needs in the community in terms of health services required; * * *

(b) Whether the proposed project can be adequately staffed and operated when completed;

(c) Whether the proposed capital expenditure is economically feasible and can be accommodated in the patient charge structure of the health care facility or health maintenance organization without unreasonable increases; and

(d) Whether the project will foster cost containment or improved quality of care through improved efficiency and productivity, * * *.

§ 100.108 Determination by the Secretary.

(a) Except as provided in paragraph (b) of this section, if the Secretary determines that (1) the designated planning agency has not been given timely notice of intention to make a capital expenditure in accordance with § 100.106, or (2) that the designated planning agency has, in accordance with the requirements of section 1122 of the Act and this subpart, submitted to the Secretary its finding that such expenditure is not consistent with the standards, criteria, or plans described in § 100.104(a)(2) then, for such period as he deems necessary to effectuate the purpose of section 1122 of the Act, he shall, in determining the Federal payments to be made under titles V, XVIII, and XIX of the Act to such health care facility or health maintenance organization, exclude expenses related to such capital expenditure.

* * *

(e) A determination by the Secretary is, under section 1122 of the Act, not subject to administrative or judicial review.

* * *

EXHIBIT H

RULE 34

The Section of Hospital and Medical Facilities
Department of Health
of the State of Nebraska

The Designated Planning Agency and
The State Health Planning and Development Agency

Nebraska Rules and Regulations
For Implementing
Section 221 of Public Law 92-603
(42 U. S. C. 1320 a-1),
Section 1122 of the
Social Security Act,
Limitation on Federal Participation for
Capital Expenditures By
Health Care Facilities, Services,
and Health Maintenance Organizations

(1) Procedural Items

(a) Timely Written Notice. Any party proposing a capital expenditure by or on behalf of a health care facility or health maintenance organization must give to the Section of Hospital and Medical Facilities, the Designated Planning Agency, and also the appropriate health systems agency, at least sixty (60) calendar days written notice prior to incurring an obligation for such expenditure. Timely written notice means that the proposed capital expenditure must be submitted in the capital expenditure project application form prescribed by the Section of Hospital and Medical Facilities (Attachment 1). A general letter of intent does not constitute timely written notice.

(b) Timely Notification of Incompleteness. If the notice under subsection (a) is found by the Section of Hospital and Medical Facilities, the Designated Planning Agency, to be incomplete, such

agency shall notify the person proposing the capital expenditure within fifteen (15) days of its receipt of such incomplete notice, advising such person of the additional information required. Where such timely notification of incompleteness is provided, the period within which the Designated Planning Agency is required to notify the person proposing such expenditure that such expenditure is not approved shall run from the date of receipt by the Designated Planning Agency of a notice containing such additional information.

(c) Revising a Capital Expenditure Proposal. Any party who has submitted a capital expenditure proposal and who intends to revise or modify the scope of such proposal as submitted to or approved by the Section of Hospital and Medical Facilities must provide such agency and the appropriate health systems agency with timely written notice of such intent, prior to incurring an obligation for such expenditure. Upon receipt of a notice to revise or modify such proposals, the Section of Hospital and Medical Facilities, in consultation with the health systems agency, will determine and notify the party making the capital expenditure proposal whether such notice constitutes a new proposal or whether it can be acted upon within the ninety-day time limit for the original proposal.

(d) Withdrawal of Notice. Any party proposing a capital expenditure may withdraw without prejudice his timely written notice of a capital expenditure proposal at any time prior to a determination by the Section of Hospital and Medical Facilities by notifying the Section of Hospital and Medical Facilities and the appropriate health systems agency of the same in writing.

(e) Final Review Notice. Final notice about the disposition of a project for Section 1122 project

review purposes must come from the Section of Hospital and Medical Facilities, the Designated Planning Agency.

(f) Final Finding. Except as provided in subsection (b) of this section, the Section of Hospital and Medical Facilities, the Designated Planning Agency, shall, prior to the date set out in the written notice of intention submitted pursuant to subsection (a) of this section as the expected date for the obligation of the proposed expenditure (but, subject to the provisions of subsection (b) of this section in no event later than ninety (90) days after the receipt of such notice unless the person proposing the capital expenditure agrees to a longer period), provide written notification to the person proposing such capital expenditure (i) that such capital expenditure has been determined by such Designated Planning Agency to be in conformity with the governing standards, criteria and plans; or (ii) that the Designated Planning Agency has elected not to review the proposed capital expenditure [which election shall be equivalent to a determination by such agency that such expenditure is in conformity with the governing standards, criteria and plans], in which event the Designated Planning Agency shall notify the Secretary of the United States Department of Health, Education, and Welfare of its reasons for electing not to review the proposed capital expenditure; or (iii) that the Designated Planning Agency having consulted with, and taken into consideration the findings and recommendations of, the appropriate health systems agency and the state health planning and development agency (to the extent that such proposed capital expenditure is within the respective fields of responsibility of such other agencies), has determined that the proposed capital expenditure would not be in conformity with the governing standards, criteria, or plans. The fail-

ure of the Section of Hospital and Medical Facilities, the Designated Planning Agency, to provide any such notification within the time limitations set forth in this subsection shall have the effect of a determination described in (i) of this subsection. The notification described in (iii) of this subsection shall be accompanied by a statement of the Designated Planning Agency's proposed recommendation to the Secretary of Health, Education, and Welfare and the reasons therefor, a summary of the findings and recommendations of the appropriate health systems agency and the state health planning and development agency and shall provide an opportunity for a fair hearing with respect to the findings and recommendations of the Designated Planning Agency at the request of the person proposing such capital expenditure.

(g) Reconsideration. A health care facility or health maintenance organization or any other applicant may request reconsideration from the Designated Planning Agency in any case in which the Secretary of Health, Education, and Welfare has determined (pursuant to a finding by the Designated Planning Agency that a proposed capital expenditure is not in conformity with the applicable standards, criteria, or plans) that expenses related to such capital expenditure shall not be included in determining Federal payments under Titles V, XVIII, or XIX. Project applicants are entitled to a reconsideration of the project by the Designated Planning Agency: (1) Whenever there is a substantial change in the need for facilities or services, of the type proposed, in the area served by such facility or organization; or (2) Upon a substantial change in the need for facilities or services, of the type proposed, in the area served by such facility or organization, as reflected in the applicable standards, criteria, or plans; or (3) At any time following the expira-

tion of three years from the date of the finding of the Designated Planning Agency or of its last reconsideration of such finding, whichever is later. If any of these three criteria are met, the applicant must submit a new Section 1122 Health Project Proposal form (Attachment 1) with all information on community need, staffing, economic feasibility, and cost containment brought up to date, accompanied by a written indication as to which of the aforementioned three criteria apply.

(2) PUBLIC FAIR HEARING

(a) APPEALS.

I. The request for a public fair hearing must be made in writing to the Section of Hospital and Medical Facilities, the Designated Planning Agency, within thirty (30) calendar days after the date on which the person proposing the capital expenditure receives notice of an adverse finding or recommendaation of the Designated Planning Agency.

II. The hearing shall be commenced within thirty (30) calendar days after the receipt of the request of the applicant proposing the capital expenditure described in paragraph I of this subsection (or later, at the option of the person requesting the hearing), and shall be conducted in accordance with the the applicable requirements of State law [Rule 56, Rules of Practice and Procedure of the Department of Health]. The Nebraska State Board of Health is the designated Appeal Agency. A committee of three to five of the Nebraska State Board of Health, upon appointment by the Nebraska State Board of Health, will act as the hearing panel or hearing board. Following the conclusion of the hearing, such hearing pan-

el or hearing board will submit its findings and recommendations in writing to the Nebraska State Board of Health. The State Board of Health as a whole shall make the decision as to whether or not the findings and recommendations of the Designated Planning Agency shall be upheld. The State Board of Health shall issue its decision and the reasons therefor in writing and transmit the same to the applicant, the Designated Planning Agency, the appropriate health systems agency, the state health planning and development agency, and other interested parties.

III. Evidence in the hearing will be received in the following order: (1) Applicant proposing the capital expenditure; (2) The Section of Hospital and Medical Facilities, the Designated Planning Agency; (3) Rebuttal by applicant; (4) Rebuttal by the Designated Planning Agency; and (5) Any interested party wishing to testify in regard to the application.

IV. The hearing shall be open to the public and shall be publicized through local newspapers and public information channels.

V. The person proposing the capital expenditure, the appropriate health systems agency, the state health planning and development agency, and other interested persons including representatives of consumers of health services, shall be permitted to give testimony and present arguments at the hearing.

VI. A record of the proceedings shall be kept in accordance with the requirements of applicable State law and copies of such record together with copies of all documents received in evidence, shall be available to the public for inspection and copying; *Provided*, That

any person who requests copies of such material may be required to bear the costs thereof.

VII. As soon as practicable, but not more than forty-five (45) calendar days after the conclusion of a hearing, the Appeal Agency shall notify in writing the applicant who requested the hearing, the Designated Planning Agency, the appropriate health systems agency, the state health planning and development agency, and other interested persons at the discretion of the Appeal Agency, of its decision and the reasons therefor. Such decision shall be publicized through local newspapers and public information channels. In the event that the Appeal Agency fails to provide notice as so required within forty-five (45) calendar days after the conclusion of a hearing, such failure to provide notice shall have the effect of a finding that the proposed capital expenditure is in conformity with the governing criteria.

VIII. Any decision of the Appeal Agency, arrived at in accordance with this Part (2) shall, to the extent that it reverses or revises the findings or recommendations of the Designated Planning Agency, supersede the findings and recommendations of the Designated Planning Agency; *Provided,* That where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the Designated Planning Agency, shall to such extent supersede the findings and recommendations of the Designated Planning Agency.

IX. To the extent that any decision of the Appeal Agency pursuant to this Part (2) requires that the Designated Planning Agen-

cy take further action, such action shall be completed by such date as the Appeal Agency may specify. Failure by the Designated Planning Agency to complete such action by such date shall have the effect of a finding that the proposed capital expenditure is in conformity with the governing criteria.

SOURCE: Sections 71-2002(2) and 71-2004(2)

Attachment 1

☐ Initial Application
☐ Application for Reconsideration

• • •

HEALTH PROJECT PROPOSAL

(For Implementing P. L. 92-603, Section 1122)

The purpose of this information is to assist the Section of Hospital and Medical Facilities in the determination of need, staffing availability, economic feasibility, and cost containment of the proposed project in the area it will serve and to serve as a planning document for the applicant.

• • •

[The nine-page application form which follows this then requests data to be measured against those criteria.]

Opposition

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1818

In The

Supreme Court of the United States

October Term 1981

BURKE E. CASARI, individually and as Director of the Section of Hospital and Medical Facilities of the Nebraska Department of Health, and HENRY D. SMITH, individually and as Director of the Nebraska Department of Health,

Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, a corporation,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Because the Respondent does not believe this case presents any special and important reasons for review on a Writ of Certiorari, the Respondent believes there are no questions presented for review. The Respondent will, however, respond to each of the questions identified by the Petitioners.

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No. 81-1818

In The

Supreme Court of the United States

October Term 1981

BURKE E. CASARI, individually and as Director of the Section of Hospital and Medical Facilities of the Nebraska Department of Health, and HENRY D. SMITH, individually and as Director of the Nebraska Department of Health,

Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, a corporation,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

GROUNDS FOR JURISDICTION

The Respondent concedes that this Court has authority under 28 U. S. C. § 1254(1) to review this case by Writ of Certiorari and that Petitioners have timely filed a petition therefor.

The Respondent strongly disagrees that any special and important reasons have been stated such that this

Court should exercise such power. The Argument of Respondent will specifically address these issues.

STATEMENT OF THE CASE

The Respondent does not accept the Petitioners' statement of the case.

For purposes of this proceeding, the Respondent accepts and adopts as its statement of the case the statement at Part I of the opinion of the Eighth Circuit (Appendix, Exh. A, pp. 2-8) and Part I of the Memorandum of Decision of the District Court (Appendix, Exh. C, pp. 20-23).

ARGUMENT

I. The Decision of the Eighth Circuit Is Not in Conflict with the Decisions of this Court Construing the Eleventh Amendment.

The first issue relates to the relief afforded by the Eighth Circuit. The District Court's Declaratory Judgment and Permanent Injunction (Appendix, Exh. C, pp. 18-19) states:

> "IT IS ORDERED AND ADJUDGED:
>
> 1. That judgment be and hereby is entered declaring that the defendants have been and are without authority to submit and are permanently enjoined from submitting a finding to the Secretary of Health and Human Services that the plaintiff's health project proposal for the reopening of a health care facility, which proposal was delivered on October 16, 1978, to the Division of Hospital and Medical Facilities of the Department of Health of the State of Nebraska, is

not in conformity with the provisions of 42 U. S. C. § 1320a-1, § 1122 of the Social Security Act;

"2. That the defendants shall submit to the Secretary of Health and Human Services a finding that the plaintiff's health project proposal is in conformity with the provisions of 42 U. S. C. § 1320a-1, § 1122 of the Social Security Act, and advise the Secretary that the notice of nonconformity dated May 24, 1979, should be considered withdrawn and void;"

The Eighth Circuit reversed that part of the District Court's order which affirmatively directed the Petitioners to notify the Secretary that the proposal was in fact in conformance with the provisions of § 1122. The Eighth Circuit so found because:

"Lacking authority to review the proposal in any manner, the defendants could logically assess neither conformance nor nonconformance." (Appendix, Exh. A, p. 16)

The Respondent does not challenge this conclusion.

Both the District Court and the Eighth Circuit considered the propriety of such order under the Eleventh Amendment. The District Court opinion found that the relief sought in the present action consists of none of the characteristics which Courts have found inimical to the purposes of the Eleventh Amendment. The Court finds that no argument is made that the requested relief would have any impact upon the treasury of the State of Nebraska and that relief is injunctive in nature and similar to the prospective relief awarded by the district court and upheld by the Supreme Court in *Quern v. Jordan*, 440 U. S. 332, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979). (Appendix, Exh. C, pp. 31-34). The Eighth Circuit, at footnote 17 (Appendix, Exh. A, p. 16), concludes that the Dis-

trict Court order, as so amended, was not barred by the proscriptions of the Eleventh Amendment. The Eighth Circuit observed that the notice required to be given by the Petitioners "gives nothing more to the Secretary than what he would have gathered by sitting in the courtroom."

This suit is brought against the two individuals responsible for § 1122 review in Nebraska. Suit was brought and relief requested based upon *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 2d 714, 28 S. Ct. 441 (1908), and its progeny.

The limits to the proper scope of relief against State officials in actions grounded on *Ex parte Young, supra,* are those stated at *Edelman v. Jordan*, 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) and *Quern v. Jordan, supra.* Both the Eighth Circuit and the District Court have found that the relief in this case is not inimical to *Edelman, supra,* or *Quern, supra.* While the Court in *Edelman, supra,* properly observes that the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young, supra,* will not in many instances be that between night and day, 415 U. S. at 667, 39 L. Ed. 2d at 675, the relief granted in the instant case clearly is not a retroactive award requiring payments from the state treasury and is thus not barred by the Eleventh Amendment.

The Petitioners persist in an argument which rejects the principle of suit against state officials under the theory of *Ex parte Young, supra.* The case of *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1948), *reh. den.* 338 U. S. 840, 94 L. Ed. 514, 70 S. Ct. 31 (1949), extensively relied upon by the Petitioners, deals with federal sovereignty and the

appropriateness of affirmative relief as against the federal government. That case does not in any way concern the Eleventh Amendment, which by its terms, concerns suits against States. The Petitioners' argument, far from following past precedents of this Court suggests a new test under the Eleventh Amendment. In doing so, the Petitioners misstate the holding in *Quern, supra,* and confuse issues of federal sovereignty from *Larson, supra,* with Eleventh Amendment issues.

II. The Decision of the Eighth Circuit Is Not in Conflict with Decisions of this Court under 28 U. S. C. § 1331.

The Petitioners next argue that the Eighth Circuit's opinion is in conflict with other applicable decisions of this Court because the Eighth Circuit found jurisdiction under 28 U. S. C. § 1331 when the case was decided with reference to State law.

The Respondent's complaint alleged that various actions and determinations by the Petitioners constituted an unconstitutional deprivation of the Respondent's civil and property rights in federal reimbursement for capital expenditures and constituted a violation of its federal statutory rights to federal reimbursement for capital expenditures. Both the District Court and the Eighth Circuit have concluded that the Complaint explicitly alleges Federal and Constitutional violations of a not insubstantial nature. The Petitioners apparently do not challenge this conclusion.

That the ground on which this case was decided required that a federal court look to State law in determining whether the Defendants had authority to act under

§ 1122 does not deprive the federal court of jurisdiction. Jurisdiction to consider the violation of federal statutory rights and Constitutional rights is not deprived because thereof. The cases cited by the Petitioners are inapplicable here.

III. The Decision of the Eighth Circuit Is Not in Conflict with Due Process Decisions of this Court.

The Petitioners next question the substance of the holding that the Respondent was denied due process of law.

This case followed the opinion of the same District Court in an action involving the same defendants—*Nebraska Methodist Hospital v. Casari,* CV 77-L-256, unreported Memorandum Decision, D. Neb., August 18, 1978, (CCH Medicare and Medicaid Guide, ¶ 29,205 (1978 Transfer Binder)). There, the plaintiffs raised, inter alia, the issue that the DPA was without jurisdiction to make an adverse finding under § 1122 because it had failed to promulgate valid regulations as required by § 1122 and the federal regulations thereunder.

Under state law, those regulations were not valid until adopted pursuant to the Nebraska Administrative Procedures Act, Neb. Rev. Stat. § 84-901 *et seq.,* which requires notice, a public hearing, approval by the Attorney General, approval by the Governor, and filing with designated state officers.

The District Court in the instant case quotes extensively from the *Nebraska Methodist Hospital, supra,* case, in which the court had concluded:

> "Having failed to promulgate the rules as required by state law, the rules are invalid. The designated

> planning agency then stands in the position of not having adopted procedures required by the federal statutes and regulations. I agree with the plaintiffs that until the regulations are promulgated in an appropriate manner, the designated planning agency is without power to act under the provisions of 42 U. S. C. § 1320a-1." (Appendix, Exh. C, pp. 27-28).

Following that decision, the designated planning agency continued to exercise its review powers under § 1122. The opinion of the Eighth Circuit at Footnote 16 (Appendix, Exh. A, p. 15), recounts the exercise of authority by the DPA over this health project proposal. The Eighth Circuit found:

> "The rule was not 'appropriately registered and filed' and thus the DPA had no authority to conduct § 1122 review until December 16, 1979 (sic. 1978). The DPA dealt with First Federal as if it had the authority to conduct such a review when First Federal made the initial contact relative to reopening the nursing home, when the health project proposal was officially submitted, and when it requested and received more information concerning First Federal's application. At all of these times the DPA acted without authority. We agree with the district court that '[w]ithout having properly promulgated the procedures required by § 1122, the designated planning agency was without power to act in relation to the plaintiff's application'."

The Defendants were required to follow federal law in conducting § 1122 review. This required the adoption of certain procedures. The District Court, sitting in Nebraska, found that the DPA, as an agency of the State of Nebraska, can only adopt rules and procedures in accordance with the Nebraska Administrative Procedures Act and that the failure to have such rules in place meant that

the Defendants lacked authority to act. Prior to the holding in *Nebraska Methodist Hospital v. Casari, supra,* (August 18, 1978), the Defendants acted pursuant to "rules" which it "adopted" on its own. It did not follow the Nebraska Administrative Procedures Act. One can only speculate on the "rules" which it utilized between August 18, 1978, and December 16, 1978. The Petitioners now concede that not until December 16, 1978, did it have rules in effect for conducting § 1122 review in Nebraska. Yet, the Petitioners' actions towards First Federal prior to December 16, 1978, leave no doubt that despite the holding in *Nebraska Methodist Hospital, supra,* they continued to purport to exercise such authority.

One of the requirements relating to the promulgation of rules by the DPA is the promulgation of procedures under which timely written notice of the intention to make a capital expenditure subject to § 1122 is required to be given. 42 C. F. R. 100.106(a)(1). Without any such rules in place there were no procedures by which to submit a health project proposal.

The Petitioners state that the procedures followed by the state *prior* to December 16, 1978, were in conformity with § 1122 and the federal regulations promulgated to enforce it and that therefore First Federal was on notice as to the requirement for submitting a health project proposal. The Petitioners fail to recognize their failure to have adopted such rules under the Nebraska Administrative Procedures Act, and their resulting lack of authority.

The Petitioners characterize the submission of the health project proposal as "voluntary." The Respondent's

submission of a health project proposal was voluntary only in the sense that any person may ignore a system of law or violate its provisions if he is prepared to suffer the statutory penalties imposed for violation of such provisions.

Finally, the Petitioners claim no prejudice was suffered. The Petitioners cannot act when they lack authority to do so—and then claim no prejudice to the parties affected thereby. The very act of exercising authority, where no such authority exists, is prejudiical to the parties involved and constitutes a denial of due process when performed under color of state law.

The decision of the Eighth Circuit is not in conflict with the applicable decisions of this Court. This Court has always held that the exercise of power by state administrative agencies, when they lack the power to so act, is a clear denial of due process of law. That the State followed its subsequently adopted procedures in conducting a hearing before finally depriving the Respondent of its property rights, does not in any way lessen the denial of such property rights.

IV. There Is No Conflict between the Decision of the Eighth Circuit and Wilmington United Neighborhoods, infra.

The Petitioners at Part IV argue that the decision of the Eighth Circuit Court of Appeals is in conflict with the Third Circuit's decision in *Wilmington United Neighborhoods v. United States,* 615 F. 2d 112 (3rd Cir. 1980), *cert. denied* 449 U. S. 827, 66 L. Ed. 2d 30, 101 S. Ct. 90 (1980). That case interprets § 1122 (f) of the Social Security Act, 42 U. S. C. § 1320 a-1 (f):

> "Any person dissatisfied with a determination by the Secretary under this section may within six months following notification of such determination request the Secretary to reconsider such determination. A determination by the Secretary under this section shall not be subject to administrative or judicial review."

The Plaintiffs in the *Wilmington* case sought review "of the substance of the DPA's approval of a proposed expenditure." *Wilmington, supra,* 615 F. 2d at 120. The *Wilmington* opinion rests on the premise of avoiding federal review of a project's consistency with standards, criteria and plans developed by State agencies. *Wilmington, supra,* 615 F. 2d at 119-121.

The Eighth Circuit distinguished *Wilmington,* finding that DPA determinations are subject to judicial review regarding issues of procedural propriety, citing *Hollingsworth v. Harris,* 608 F. 2d 1026 (5th Cir. 1979), *reh. en banc den.* 614 F. 2d 294 (5th Cir. 1980). There, an adverse determination of the Secretary was challenged on procedural grounds for failure to provide public notice in accordance with federal regulations. The Court in *Hollingsworth, supra,* determined that judicial review of administrative agency determinations was available to assure agency compliance with internal procedures.

The instant case presents an even stronger case for affording judicial review, as recognized by both the Eighth Circuit and the District Court. The Eighth Circuit stated:

> "First Federal's challenge herein is that the defendants were entirely without power to act upon their claim because of their failure to have regulations in effect at the time the proposal was submitted. No claim is made that the substance of the local standards

or review conducted thereunder was incorrect. The challenge is one going directly to the *power* of the DPA to act, and therefore procedural in nature. As such, it falls within the purview of the class of DPA orders subject to review." Appendix, Exh. A, p. 14.

The District Court opinion is equally clear:

"The present case, involving the issue of whether the designated planning agency had the authority to conduct a § 1122 review of the plaintiffs' health care proposal, does not initially involve the review of the determination by either the Secretary or the designated planning agency. The initial question presented is whether the designated planning agency has complied with § 1122 and the federal regulations implementing § 1122 so that it may engage in *any* § 1122 review of this health care proposal. These aspects of the statutory scheme do not concern the autonomy of the state and local agencies or the discretion vested in them or in the Secretary.

"Section 1122 and the regulations issued thereunder require that certain agreements be entered into and that certain rules be enacted by the state before the Secretary is entitled to rely upon or is bound by the designated planning agency's determinations. Compliance with these enabling-type provisions is not a matter encompassed by the language of § 1122 (f) whether or not that provision is construed to preclude judicial review of determinations made pursuant to § 1122 by the designated planning agency as well as determinations made by the Secretary. The statute does not vest in the Secretary or in the designated planning agency the authority to disregard the prerequisites to the exercise of authority under § 1122 by the designated planning agency. I remain convinced that § 1122 (f) does not preclude judicial review of the procedures by which the designated planning agency claims to have qualified as an appropriate health care proposal review agency under § 1122." Appendix, Exh. C, p. 25.

Quite clearly, neither the District Court nor the Eighth Circuit opinion is in conflict with the *Wilmington, supra,* opinion. The instant case addresses an issue entirely different from that addressed in *Wilmington, supra.* There is no internal inconsistency in the conclusions of the two Courts.

CONCLUSION

Petitioners have strained hard to identify conflicts between the Eighth Circuit's decision and decisions of other circuits or inconsistencies between the decisions of the Eighth Circuit and this Court. Contrary to their efforts, there simply are no such conflicts or inconsistencies.

While conflict or inconsistency is not the sole test for the exercise of certiorari jurisdiction, there has been no other showing of special and important reasons such that the Court should exercise certiorari jurisdiction.

The decision does decide an important issue of power of Nebraska state agencies. When the federal government enters into cooperative arrangements with the States, it has in many cases required that States engage in certain enabling-type actions before certain federal consequences will follow. Thus, State agencies implementing federal programs may be required to adopt certain procedures for carrying out certain functions under such cooperative federal-state programs. Such agencies remain state agencies subject to state law. Under the theory propounded by Petitioners in *Nebraska Methodist Hospital v. Casari, supra,* and renewed in this case, the DPA acts in the role of a super agency—not answerable under either

state or federal law. The result is the potential for unconstitutional actions of the highest magnitude. The decision of the District Court and the Eighth Circuit puts an end to this notion.

While the principle is important to the parties in this case and future actions by Nebraska state agencies, the belated adoption of rules on December 16, 1978, means that the issue has been resolved for future dealings of the DPA. In addition, so far as the Respondent is aware, there are no other decisions in Nebraska which hinge upon the outcome of this case. Finally, Nebraska has since adopted the Nebraska Health Care Certificate of Need Act, Neb. Rev. Stat. § 71-5801 *et seq.*, which provides for a single unified review process for all applications submitted under that act and § 1122. Accordingly the procedure at issue and the procedure finally implemented by the DPA, when it adopted rules on December 16, 1978, is no longer in use.

The Respondents pray that the Petition for Certiorari be denied.

Respectfully submitted,
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